

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES

ICSID Case No. ARB/21/29

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 In the Matter of Arbitration Between: :
 :
 Kaloti Metals & Logistics, LLC, :
 :
 Claimant, :
 :
 and :
 :
 THE REPUBLIC OF PERÚ, :
 :
 Respondent. :
 ----- x Volume 5

HEARING ON JURISDICTION AND THE MERITS

Friday, July 28, 2023

The World Bank Group
1125 Connecticut Avenue, N.W.
Conference Room C1-450
Washington, D.C.

The Hearing in the above-entitled matter
came on at 9:02 a.m. before:

PROF. DONALD McRAE
President of the Tribunal

PROF. DR. JOSÉ CARLOS FERNÁNDEZ ROZAS
Co-Arbitrator

PROF. DR. ROLF KNIEPER
Co-Arbitrator

ALSO PRESENT:

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Secretary to the Tribunal

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P R O C E E D I N G S

PRESIDENT McRAE: If the Parties are ready,
I think we can proceed.

Good morning, everyone. I apologize, my
voice, I'm succumbing to heat-cold, air-conditioning
and non-air-conditioning syndrome in Washington.

Are there any issues to be raised by the
Claimant this morning before we start?

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

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[REDACTED] [REDACTED]

9

[REDACTED]

10

[REDACTED]

11

[REDACTED]

12

[REDACTED] [REDACTED]

13

PRESIDENT McRAE: Anything from Respondent

14

this morning?

15

Then we can start with the Expert Witness.

16

ALMIR SMAJLOVIC, CLAIMANT'S WITNESS, CALLED

17

PRESIDENT McRAE: Good morning,

18

Mr. Smajlovic. I'm probably mispronouncing your name.

19

I apologize.

20

THE WITNESS: Last name pronunciation is

21

Smajlovic.

22

PRESIDENT McRAE: I will certainly try to do

1 that.

2 You may have been here for the other expert
3 presentations or you may have done this before on
4 other occasions, but you know the system is that you
5 make a statement, we'll then have you briefly
6 introduced by counsel for the Claimant, and then you
7 will be cross-examined by counsel for the Respondent.
8 There may be a redirect, and maybe questions from the
9 Tribunal.

10 I think we have to start with you making the
11 Declaration, which should be in front of you. I would
12 ask you to read that out.

13 THE WITNESS: Do you need me to read it?

14 PRESIDENT McRAE: Please. And read it into
15 the record.

16 THE WITNESS: Will do.

17 I solemnly declare upon my honor and
18 conscience that my statement will be in accordance
19 with my sincere belief.

20 PRESIDENT McRAE: I think that's the
21 Witness's declaration. Can you turn it over--that is
22 the Expert one? Okay. Thank you very much.

1 Please proceed with your statement.

2 DIRECT EXAMINATION

3 BY MS. HORMAZABAL:

4 Q. Good morning, Mr. Smajlovic. Could you
5 please state your full name for the record.

6 A. Almir Smajlovic.

7 Q. And you're here to provide your expert
8 opinion in quantum damages; is that correct?

9 A. That's correct.

10 Q. Are those your two quantum Expert Reports on
11 your desk?

12 A. Yes.

13 Q. Please advise if you would like to provide
14 any corrections or changes to either of your Reports.

15 A. I do.

16 As part of my review in preparation for the
17 Hearing, I have identified several points which
18 require some corrections and you will get the errata
19 sheet which indicates on the left-hand side what was
20 actually written. On the right-hand side is the
21 actual correction that I would like to make.

22 So, as you will see, most of these refer to

1 the reference to EBITDA. Instead of EBITDA, it should
2 be unlevered free cash flow.

3 And I also referred to Financial Statements
4 of Kaloti as audited. I would like to make a
5 correction, those are not Audited Financial
6 Statements. They were reviewed and compiled.

7 And I believe we made a reference one time
8 for 1.8 billion in sales revenue. The correct number
9 is 1.33 billion in sales revenue.

10 None of these corrections, I would like to
11 iterate, changes my conclusions in any way.

12 That would be it.

13 MS. HORMAZABAL: We're distributing the
14 physical copies.

15 PRESIDENT McRAE: You finished, and he can
16 now start his presentation.

17 MS. HORMAZABAL: (Nods.)

18 PRESIDENT McRAE: Thank you.

19 Please go ahead, Mr. Smajlovic.

20 THE WITNESS: Thank you, Mr. President.

21 DIRECT PRESENTATION

22 THE WITNESS: Good morning. Again for the

1 record, my name is Almir Smajlovic, I'm a managing
2 Director at Secretariat International and I'm a
3 quantum expert hired by counsel for the Claimant to
4 calculate damages to the Claimant in this matter.

5 Mr. President and Members of the Tribunal,
6 thank you again for me giving me this opportunity to
7 present to you my valuation findings.

8 Slide No. 2 shows our Agenda which includes,
9 as you can see, 12 topics that I will be going over.

10 I will next summarize excerpts from my CV.

11 Of note, I would like to highlight that I'm
12 a Certified Public Accountant, or CPA, and a Certified
13 Valuation Analyst, or "CVA." I've spent also four
14 busy seasons at PricewaterhouseCoopers, one of the big
15 4s, where I audited public companies. I also assisted
16 privately-held companies in their IPOs, and while at
17 my previous employer, Alvarez & Marsal, I was involved
18 in several restructuring engagements. The training
19 and experience that I've gained on these engagements
20 provided me with an in-depth understanding of
21 financial reporting, especially U.S. GAAP, as well the
22 construction of the Financial Statements. These

1 skills, I believe, are of particular importance in
2 this matter, which calls for the interpretation of the
3 financial records of a unique business that operated
4 for a relatively short period of time, experienced
5 high growth upon commencement of its initial
6 operation, but ultimately reached a state of economic
7 distress.

8 My instructions are outlined extensively in
9 my two Reports. In my First Report, I was asked to
10 calculate the loss suffered by the Claimant due to the
11 full expropriation of the business interest and
12 property of KML. In my Second Report, I was asked to
13 respond to the Expert Report of Brattle, including
14 updating my conclusions, if needed.

15 I received several instructions from counsel
16 regarding my calculations. All of these instructions
17 relate to either factual or legal matters, which are
18 outside of my expertise. I summarized them here for
19 your convenience, and these are set out in details in
20 my Report under the same heading. I would like to
21 reiterate, however, that I have not taken any
22 instructions which are within my expertise.

1 In addition to the legal instructions
2 regarding my assignment, I want to discuss two
3 instructions from counsel which affect my
4 determination of damages. First relates to the issue
5 of causation. This is a factual matter that is to be
6 decided by the Tribunal. In this presentation, I will
7 explain the financial impacts on KML as a result of
8 lower gold purchase volumes. The Claimant alleges
9 that these lower volumes are due to the Measures,
10 while the Respondent suggests that there might be some
11 alternative causes. It is ultimately for the Tribunal
12 to decide whether the Measures ultimately caused the
13 lower purchase volumes and KML's eventual exit from
14 the Peruvian gold market.

15 Second, we make no legal determination on
16 the title of the seized gold, and I have been asked to
17 assume that KML has title to the gold and thereby was
18 a bona fide purchaser of the gold. In this
19 presentation, I will explain the financial impacts on
20 KML as a result of the seized gold as well.

21 As you have heard many times throughout this
22 week, the Claimant in this matter is Kaloti Metals &

1 Logistics LLC, a limited liability company based in
2 Miami, Florida. As further background, I want to
3 discuss the arrangements that KML had with [REDACTED]. [REDACTED]
4 was KML's primary purchaser of gold and, as I
5 understand, provided the necessary staff training and
6 financing to KML. [REDACTED] also provided KML with a letter
7 indicating a willingness to purchase up to 45 tons of
8 gold for a period of three years.

9 It also committed the resources needed for
10 KML to achieve this target. This is evidenced by an
11 ongoing financing arrangement that [REDACTED] provided to KML
12 as shown on the top right-hand side of this Slide 10.

13 Next, I will touch upon KML's actual
14 performance between 2012 and 2018. On this Slide 12,
15 I provide an overview of KML's operations prior to and
16 following the Measures, which initially occurred, as
17 you know, in November of 2013. KML's operations
18 commenced in 2011, and KML entered the Peruvian market
19 in 2012. Initially, they purchased only 256 kilograms
20 which was followed by 14,011 kilograms in 2013. That
21 was an increase of 54 times. From 2011 to 2013, KML
22 also experienced a substantial growth from other

1 countries. This growth in volume is presented in the
2 first chart on the top of this Slide 12.

3 In terms of financial performance, KML's
4 actual sales revenue and cash flow, that gold
5 sale--cash flow increased. For example, the revenues
6 increased from 800 million in 2012 to 1.3 billion in
7 2013. Cash flows went from 3 million in 2012 to
8 1.4 million in 2013. However, I would like to note
9 that, in 2013, approximately 4.4 million of gold
10 inventory was seized. But for the seizure, 2,000 cash
11 flows would have been increased to approximately
12 \$6 million in a single year. This figure is important
13 to remember because, in a single year, which is 2013,
14 KML would have generated approximately \$6 million of
15 positive cash flows.

16 Following 2013, you will notice a decline in
17 volumes from all countries and corresponding decrease
18 in the cash flows. You will note, however, despite
19 the Measures, KML continued to operate as a going
20 concern and generated positive cash flows in 2016 and
21 2017.

22 On this Slide 13, I showed various metrics

1 indicating KML's actual performance from 2012 to 2018.
2 Of note, I want to highlight that, despite lower
3 volumes, which affect profitability, KML was able to
4 generate higher EBITDA margin in 2016 and 2017, which
5 contributed to the positive cash flows I noted on the
6 previous slide. Besides EBITDA, the Return on Capital
7 employed also indicates improvements in 2016 and 2017,
8 compared to prior two years. Despite the efforts to
9 maintain its operations, the impact of the declining
10 volumes compounded by the inventory seizures made it
11 impossible for KML to satisfy its financial
12 obligations in November of 2018. Now, I would like to
13 briefly discuss the three heads of damages I've
14 included in my assessment of damages.

15 I have been asked to quantify three heads of
16 damages suffered by KML. The first head of damages I
17 calculated is from January, 21, 2014, through
18 30th November of 2018. Throughout my Reports and
19 presentation, I will refer to it as "lost profits" or
20 "historical losses." In this calculation I apply two
21 alternative Pre-Award Interest Rates to the estimated
22 losses to bring it to a present date.

1 The second head of damages is the Fair
2 Market Value of seized inventory. I calculate this
3 value based on the Inventory Net Volume and the
4 prevailing gold price. In accordance with my
5 instructions, I provide two alternative calculations
6 as of two different dates: One as at the Valuation
7 Date of 30th November 2018, and second as of what I
8 would refer to as close as to the "current date,"
9 which is close to my Report issuance date. Obviously,
10 I cannot--upon request, I can update these calculation
11 if needed. The third head of damages is determined
12 based on the Fair Market Value of the expropriated
13 business or Expropriated Vale of KML as at Valuation
14 Date. Later in this presentation I will discuss
15 specific of each of these heads of damages.

16 In this section of my presentation, I will
17 discuss my top-down approach for estimating lost
18 profits, or damages head No. 1, and the Expropriation
19 Value, damages head No. 3, and the key inputs into my
20 determination of damages. Specifically, I will be
21 addressing my approach to estimating but-for sales
22 revenue based on estimated gold volumes and gold

1 prices and the resulting cash flows to KML.

2 In this slide, I discussed my estimates of
3 the but-for gold volumes of KML which apply to both
4 heads of damages. To determine the but-for volumes, I
5 relied upon Perú's "reported gold production volumes"
6 from 2010 to 2019. I then considered that [REDACTED]
7 expressed interest to purchase up to 45 tons of gold
8 annually from KML's Peruvian branch, and I used that
9 to determine KML's share of the estimated reported
10 production in Perú. This should not be confused with
11 the Market Share, as the counsel for the Respondent
12 portrayed it on Monday.

13 Considering the substantial growth in
14 purchased volumes KML achieved in 2013 up until the
15 seizure of gold in November of 2013, I assumed that
16 KML would achieve two years of linear growth whereby
17 their purchases will reach the maximum of 32.5 tons in
18 Perú. This two-year growth is then followed by
19 continuous decline in purchase volumes all the way up
20 to 2048. Figure 10 shown on this bottom-right of the
21 slide shows the decline in volumes which I used.

22 My approach to volumes is conservative. I

1 only rely--and I repeat this: I only rely on the Gold
2 Reserves which existed as of 2018. As such, for
3 30 years into the future, I did not consider any new
4 developments that will be made, any new discoveries of
5 gold which would have increased the total volumes, or
6 any of the additional gold inventory that was sitting
7 that was not part of the production volumes that I
8 relied upon.

9 The next thing put to my calculation of
10 damages is the gold price. In terms of lost profits,
11 I relied on the actual prices realized by KML during
12 the historical period. This is needed to ensure that
13 the price difference does not create any damages. We
14 have the same price in the but-for and the actual
15 world. In terms of my calculation of KML's Enterprise
16 Value or Expropriated Value, I'd been asked to prepare
17 my damages calculation under the assumption of an
18 unlawful expropriation, whereby the Claimant is
19 entitled to an increase in the value of the assets or
20 business from the date of taking and the date of the
21 Award. This differs from a typical valuation where a
22 valuator only considers information known or knowable

1 as at the Valuation Date. Consistent with my
2 instructions, I used spot prices past 30th November of
3 2018. Throughout my Report dates, then I also rely
4 after those spot prices expired, I rely on the futures
5 prices as reported from Capital IQ.

6 Early-period high gold prices from my model,
7 which is shown over here in the red line, represent
8 the main difference between my actual gold prices and
9 Brattle's prices which is in the blue line on this
10 Figure 12.

11 I would like to reiterate that, as part of
12 my Second Report, I have not made any pricing updates.
13 For conservative reasons, I have maintained the same
14 pricing curve that I used as part of my First Report,
15 despite higher prices as of the Second Report.

16 In this Slide 19, I discussed at high level
17 how I arrived at the but-for profits and cash flows of
18 KML. Each input to my cash-flow calculation set out
19 in my DCF Model AS-68, specifically Tab 3.2 BF. "BF"
20 stands for but-for modeling inputs.

21 In Annex 1 of my First Report, I set out in
22 detail why the operating margins of KML were affected

1 by lower gold volumes and why this existence must be
2 carefully considered in estimating KML's but-for
3 operating profits and cash flows. In other words, it
4 will be inappropriate to use financial metrics from
5 the actual world, where the volumes were low and the
6 metrics worsened as part of the but-for world. This
7 is exactly what Brattle has done.

8 I specifically observe that due to the
9 Measures and materially reduced gold volumes, KML
10 experienced a higher cost on a per-unit basis, higher
11 cost of financing and deteriorating working capital.

12 For illustration, Figure 21 on this slide
13 presents total operating expenses as a percentage of
14 revenues and on a per-unit basis. This clearly shows
15 that when volumes decline, the cost on a per-unit
16 increases. You have heard this term many times, I'm
17 sure, and it's referred to as "economies of scale,"
18 which refers to a proportional saving in cost gained
19 by an increased level of production.

20 As a further support, at the bottom of this
21 Slide 19, you will see excerpt from a contemporaneous
22 document evidencing that [REDACTED] was offered--offered to

1 KML more favorable refining charges based on higher
2 volumes. The same is true in case of the financing.

3 So, as shown here, it is essential to
4 maintain higher volumes in this business.

5 In this section, I discuss the results of my
6 lost-profits calculation, and I highlight some
7 observations from these results for the Tribunal to
8 consider.

9 To determine the lost profits, I estimate
10 the cash flows that KML would have achieved absent the
11 Measures and deduct the actual cash flows that were
12 achieved under the Measures. The graph on this
13 Slide 21 shows a comparison between the but-for cash
14 flows I estimated, which is in the red bars, and the
15 KML's actual cash flows, which is represented in the
16 blue bars. To arrive at lost profits, I take the
17 difference between these two, and then I apply
18 Pre-Award Interest up to a present date.

19 I also want to highlight to the Tribunal two
20 observations that are obvious and important in the
21 actual cash flows of KML. The 2014 actual cash flow
22 shown in first circle on the left, the bottom left,

1 was negative, and this is primarily driven by the
2 seizure of inventories and its effect on the Company's
3 Working Capital, which had a negative 8.3 million
4 impact on the business in that year.

5 Second, KML generated positive cash flows in
6 2016 of 3 million and 2017, 3.7 million, and these
7 cash flows serve as an offset to this head of damages.

8 My conclusion is lost profits are
9 approximately 27 million, which is based on the
10 but-for volume from all countries, Perú and other; and
11 approximately 12.7 million from Perú only.

12 I will now discuss head Number 3 since it
13 relates to expectation damages just as Number 1
14 discussed on the previous slide.

15 Like in lost profits calculation, to
16 calculate Enterprise Value, I estimate the cash flows
17 that KML would have achieved absent the Measures.
18 Since KML ceased its operation in November of 2018, I
19 have no actual scenario to calculate which could be
20 used to offset the value. The graph on this Slide 23
21 shows declining cash flows due to my assumption of the
22 declining volumes which I already mentioned earlier.

1 I also want to highlight to the Tribunal two
2 observations, which are linked with KML's cash flows.
3 The average volumes I assumed from Perú are less than
4 20,000 kilograms per annum--not 45,000 kilograms but
5 20,000. And this is from 2019 all the way to 2048.
6 This can be found again in my AS-68 Tab 3.3 "Damages,"
7 specifically Row 19.

8 Same thing: Because of this, my average
9 cash flows I calculate from Perú around 1.75 million
10 per annum.

11 In terms of volumes from other markets, and
12 those represent at least 18 countries as shown in
13 Appendix 3.9.2, I have maintained the observable ratio
14 of the volumes between Perú and other markets which
15 existed in 2013. Out of all possible modeling
16 options, I considered this approach to be the least
17 subjective of all; in other words, 18 countries are
18 assumed to provide approximately 53 percent of the
19 total gold purchased by KML.

20 To arrive at Expropriated Value, I discount
21 all the future cash flows, which are shown here as
22 declining in each year, to the Valuation Date. I then

1 apply Pre-Award Interest to bring them to a present
2 date. Considering that during 2013 KML would have
3 generated close to \$6 million in a single year,
4 positive cash flows, absent the Measures, our
5 calculation of 30-year cash flows is supportable.

6 My conclusions on the Expropriated Value of
7 KML are approximately 70 million before tax, which
8 includes gold volumes from Perú and other countries as
9 well. This number decreases to 28.4 million should
10 the Tribunal find that only lost gold volumes from
11 Perú should be taken into account. Brattle, on the
12 other hand, presents an Expropriated Value of
13 3.40 million, 30 years of cash flows are valued at
14 3.4 million. I would like to remind you that this
15 value is actually lower than the cash flow KML
16 generated during 2017 under the Measures. I believe
17 that Brattle has never stepped back and reassessed
18 their findings. Had they done that, they would have
19 realized that their valuation conclusions are
20 unreasonable.

21 On the issue of taxation of a non-taxable
22 entity will be discussed next.

1 There seems to be some confusion on the part
2 of Brattle as to whether the earnings of KML should be
3 taxed; and, if so, how to account for these taxes. I
4 reiterate that KML is a Florida-based Limited
5 Liability Company; and, therefore, the Claimant is not
6 liable for any Corporate Income Tax.

7 We could just stop here.

8 In case of LLCs, as the Company generates
9 positive income, the taxes are levied at the members
10 level, not the Claimant's level. This is the approach
11 I have taken. In my First Report, I applied
12 29.5 percent Tax Rate to KML's before-tax cash flows.
13 This is simply done to allow me to compare KML's
14 metrics against other companies which are paying
15 taxes. After arriving at the damages, I next applied
16 a gross-up to bring the damages to a pre-tax
17 equivalent in line with LLC's tax treatment.

18 Battle has criticized my Tax Rate and
19 gross-up and suggested in Paragraph 213 of their First
20 Report that "instead of using a U.S. Tax Rate," I have
21 incorrectly applied the "Peruvian Tax Rate." As part
22 of their First Report, Brattle seemed to be suggesting

1 that U.S. taxation is applicable onto KML's earnings.
2 It is not.

3 In my Second Report, to eliminate any
4 confusion regarding taxation, I removed the estimated
5 U.S. tax which I originally applied. This eliminated
6 the need for any gross-up. The results--this results
7 in the same economic position as presented in my First
8 Report.

9 As part of their Second Report, however,
10 Brattle takes a completely different position on
11 taxation. In Paragraph 301 of their Second Report,
12 Brattle states that rather the Peruvian Tax Rate now
13 should be applied.

14 I note, Brattle added Peruvian taxes in KML,
15 despite zero evidence on record that KML generates any
16 positive Peruvian-sourced income. Brattle has no
17 basis for this artificial taxation.

18 Next, I discuss the reasonability of my
19 Discount Rate, which was also. Brattle and I agree
20 that there is no publicly-traded company that is
21 comparable to KML's operation. As I explained in my
22 Reports, KML is not a company that is engaged in

1 mining of precious metals; and, as such, it is not
2 exposed to any--to many risks faced by mining
3 companies. From a standpoint of WACC calculation,
4 specifically determination of beta, which is a measure
5 of the systematic or market risk, in my view, instead
6 of a precious metals company beta, KML's beta more
7 closely resembles some of the financial services on
8 non-banking sector. Using the Capital Asset Pricing
9 Model, or "CAPM," which is a financial model that
10 calculates the expected Rate of Return for an asset,
11 and applying capital structures of the firm, and I use
12 the beta from the precious metals industry, I
13 calculate a WACC of 4.4 percent. This calculation is
14 shown on this Slide 27. Despite this calculation, I
15 applied a higher WACC of 5.2 percent.

16 Additionally, as discuss in Paragraph 6.131
17 of my Second Report, my Discount Rate is highly
18 supportable, considering that for its operation in
19 Perú, Barrick Gold, a mining company, estimated WACC
20 of 3.8 percent. That's in Exhibit AS94. Brattle
21 suggests that 3.8 percent WACC is most likely a real
22 WACC. Assuming they're correct, often adding

1 inflation to the WACC, the WACC increases for the
2 precious metal company to 5.8 percent. In my view,
3 the 5.2 percent WACC I assumed for KML, compares to
4 5.8 for a mining company, serves as a support that my
5 calculation of WACC is reasonable.

6 Last, I discuss the remaining head of
7 damages, which is the value of seized inventory.

8 The value of seized inventory is based upon
9 my legal instruction that KML has title to the seized
10 gold. As mentioned, I provide two alternative
11 calculations based upon the net weight of
12 448.6 kilograms, which I derive from a KML's receiving
13 document. My first calculation calculates the value
14 of the gold as at the Valuation Date using the gold
15 spot rate at that particular date. This value is then
16 brought forward to a current date to account for
17 Pre-Award Interest. As of the Valuation Date, I
18 determined the gold to have a value of 17.7 million
19 roughly, before Pre-Award Interest.

20 My alternative calculation is to calculate
21 the value of the gold at the current date. At the
22 time I prepared my Second Report, I used November 2022

1 price. Use of a subsequent price results in a higher
2 value for the gold inventory due to higher gold prices
3 at that time. I calculated a value of the gold to be
4 24.6 million.

5 Now, I would like to spend some time
6 discussing some specific comment or issues raised by
7 Brattle in their Reports. I cannot cover all of those
8 due to time restrictions, but will discuss some of the
9 most relevant topics which are affecting damages.

10 To start, I want to discuss Brattle's
11 estimates of KML's share of Perú's gold production.
12 Brattle maintains a status quo for KML; in other
13 words, assuming they will only have access to small
14 and artisanal and other Suppliers for 35 years into
15 the future. They assume no access to large or medium
16 producers in Perú based on this actual Supplier mix
17 which existed in 2013.

18 This mix tends to change from year to year.
19 This reduction in volumes has a detrimental impact on
20 KML's value.

21 Additionally, Brattle assumes that the
22 proportion of small to large Suppliers will remain

1 unchanged over the entire period. In other words,
2 that existing contracts between large producers and
3 their customers at the time will remain unchanged for
4 30 years, therefore, restricting KML access to any of
5 those. This is unsupported.

6 In fact, their own data contradicts this
7 important assumption. For instance, I note in 2019
8 Newmont, one of the big producers, has canceled its
9 existing Supply Contract and has contracted with
10 different Parties. This is shown in Brattle's
11 Exhibit 73. Clearly, Brattle has no basis for these
12 unsupported assumptions.

13 As shown in my Second Report, specifically
14 Figure 3 and also as discussed in Paragraph 5.20 of my
15 Second Report, the actual Market Share of the three
16 producers, which were chosen by Brattle as an
17 example--specifically Newmont, Barrick,
18 Buenaventura--was cut in half by 2019. This means
19 that the composition of large, medium, and small
20 producers of gold in Perú changes. For your
21 convenience, I've included some graph demonstrating
22 this in Annex 1 of this presentation.

1 I want to point out that although Brattle
2 criticizes me for using ex post prices in my
3 calculations, Brattle too uses ex post information in
4 their damages calculation. In fact, their use of ex
5 post informations spills over the period of 30 years.
6 Specifically, Brattle's 2019 volume forecasts starts
7 with 33,858 kilograms, which corresponds to the actual
8 2019 gold production allocated to small and other
9 producers from Perú. I remind you, Brattle assumes
10 KML can only transact with these small type of
11 producers.

12 Next, Brattle allocates 31.59 percent share
13 of this submarket to KML, to forecast total small and
14 other producers' volumes for 2020 to 2048, Brattle
15 starts with this 33,858 kilograms from 2019, and for
16 each year thereafter up to 2048. They linearly
17 decrease this ex post 2019 production to estimate
18 their but-for volumes by--they linearly decrease this
19 figure by 2.5 percent. This can be found in BR-108,
20 Tab C-1, Cell L16. As shown, Brattle has also used ex
21 post information where convenient.

22 Next, I want to discuss Brattle's position

1 regarding KML's capital structure. As will be
2 demonstrated on this Slide 33, Brattle's analysis
3 lacks basic due diligence. Brattle assumes that,
4 during 2012 and 2013, KML did not have any debt
5 outstanding, and its sole financing was 800,000 in its
6 Members' equity.

7 As a valuator, you need to take a step back
8 and assess what is within the realm of possible.
9 Specifically, you should ask yourself can a firm fund
10 1.33 billion in sales revenue using 365 days of
11 operation using only \$800,000? Of course not.
12 Applying a simple math, for instance, and considering
13 as demonstrated in Figure 1 of my First Report, that
14 lead time, from the time you purchased and then you
15 sell and received cash, is at minimum three days. At
16 the optimal situation, business cannot churn more than
17 100 million in sales revenue from this 800,000 in
18 capital. Brattle never bothered to investigate the
19 financing source of the remaining 1.23 billion, which
20 is a difference between 1.33 billion, which they
21 achieved in the actual world, minus maximum
22 100 million, which they can achieve with 800,000.

1 This is where the Revolving Credit Facility is used to
2 abridge the financing need of KML. The nature of a
3 revolver is that you draw down on it when you need the
4 cash or finances to purchase the gold, for instance,
5 and you pay it down when you sell the gold or when you
6 ship the gold. The outstanding balance fluctuates
7 daily, and interest is charged based on the average
8 balance outstanding.

9 Furthermore, in case of a revolver, Balance
10 Sheet is not the best source to verify outstanding
11 balance. That is because the Balance Sheet is a
12 snapshot at a particular point in time; and, by its
13 nature, revolver changes daily. However, we can
14 detect from the Income Statement the interest charges
15 paid by KML over the course of the year, which I
16 present in the chart on this slide, that could easily
17 tell us the outstanding balance, debt balance,
18 throughout the year.

19 The chart on this page shows you that,
20 although the Balance Sheet showed no debt as at
21 31 December 2012 and '13, KML reported financing costs
22 that increased from 330,000 to 760,000 respectively.

1 This happens to correspond to an increase in gold
2 sales which also increased from 800 million to
3 1.33 billion. I have to apologize. Excuse me for
4 this.

5 (Witness drops clicker on floor.)

6 THE WITNESS: Brattle's suggestion that
7 there's no evidence of any debt is, therefore, clearly
8 incorrect.

9 Another topic I need to address is Brattle's
10 flawed calculation of the returns implied by my model.
11 Part of their error comes from their misunderstanding
12 of KML's financing I just discussed in the previous
13 slide. Their incorrect calculations are then compared
14 to those of Apple stock to suggest my DCF conclusions
15 are somehow unreasonable. For all the reasons I set
16 out in my Reports, the comparison of the returns of
17 KML and Apple do not make sense. Nevertheless, even
18 if you accept the comparison of these two companies as
19 reasonable, Brattle calculates the returns
20 incorrectly.

21 In their First Report, Brattle compares
22 Apple's equity--I repeat this--equity returns, on

1 their public stock, to their return, which are derived
2 from KML's free cash flows to the firm. I remind you
3 that free cash flows to the firm represents cash flows
4 which are attributable to both debt and equity
5 investors. At the start, they're not even comparable.
6 Further, in their attempt to calculate the return,
7 Brattle ignores the debt/capital of KML. They
8 erroneously state that the debt does not exist.
9 Ignoring debt results in alleged 221 percent return on
10 capital.

11 As part of their Second Report, however,
12 Brattle provides an updated calculation of this return
13 which now includes a debt of 2.3 million but only in
14 2011. This new calculation shows a decline in the
15 alleged return from the original at 221 percent down
16 to 120. Brattle should not have stopped there, but
17 they did. On my previous slide, I showed you how
18 KML's business requires debt, which I estimate in
19 excess of 12 million. The fact that Brattle ignores
20 these debt figures results in this artificial
21 inflation of the KML's returns.

22 This Slide 35 provides some points regarding

1 Brattle's Market Approach to value KML, which it
2 prefers over the Discounted Cash Flow Method. Brattle
3 uses transactions involving two refineries--I repeat,
4 two refineries--Rand and Valcambi, which are based in
5 South Africa and Switzerland, respectively--and they
6 use those to estimate the value of KML. The fact is
7 KML is not a gold refinery, and this, alone, makes
8 their approach unreliable.

9 In Sections 6(b)(4) and 6(b)(14) of my
10 Second Report, you will find all the reasons why Rand
11 and Valcambi transactions are not appropriate, so I
12 will not repeat them here.

13 Brattle has made some updates in their
14 latest report, but their suggested approach still
15 remains unreliable. Specifically, Brattle uses,
16 again, equity multiples from these two transactions to
17 derive KML's Enterprise Value. These two are very
18 different values. Brattle's application of the equity
19 multiples is evident in their application of the
20 Control Premium which is, by the way, only applicable
21 to equity share of the firm's value.

22 Next, Brattle should have, at the very

1 least, added the debt, but they did not, which
2 explains why they have materially lower values.
3 Furthermore, Brattle makes no adjustments to the
4 multiples they use to account for the inherent
5 differences shown in the table of the Slide 34.

6 In summary, their entire calculation should
7 be disregarded.

8 On this Slide 36, I will discuss Brattle's
9 proposed deductions against the but-for value of KML.

10 In their First Report, Brattle suggests the
11 actual value of KML was 195,000, and they used this
12 amount to reduce any but-for value. In their Second
13 Report, however, Brattle changes their approach. Now
14 they claim to calculate KML's actual Enterprise Value,
15 which they suggest is worth 565,000. Neither of these
16 deductions are appropriate. Brattle proposes that
17 they--that their calculation continues to rely
18 on--sorry.

19 I know that Brattle's calculation continues
20 to rely on the Book Value of reported debt and equity,
21 which is not in line with the Enterprise Value formula
22 shown in Figure 11 of my Second Report. For example,

1 although they are correct in assigning a Fair Market
2 Value of zero to inventory in 2018, they assign a Fair
3 Market Value of 12.6 million to KML's debt.

4 I remind you, over here they assigned a
5 value to debt, but before, for the previous years when
6 they calculated returns, they stated there is no debt.
7 I disagreed with this value that they assigned to
8 debt. In essence, Brattle assigns 100 percent value
9 of the loan that any prudent or willing buyer would
10 consider non-performing and, thus, worthless. As
11 such, Brattle grossly overstates the actual value of
12 KML, especially if we assign Fair Market Value of debt
13 to nil. Correcting for these errors results in a
14 negative Enterprise Value of 14 million as shown in
15 this slide.

16 In my calculations, however, I
17 conservatively make no deduction for the negative
18 value of KML, and I maintain zero value.

19 With this, I conclude my presentation.

20 I just want to mention that in the back you
21 will see the artisanal and other producers in Perú
22 annex that I mentioned previously in my presentation.

1 Thank you very much.

2 PRESIDENT McRAE: Thank you.

3 We will take a moment while we remove the
4 podium, I think, and then we can start the
5 cross-examination.

6 MR. SMYTH: Just a quick point of order in
7 the meantime, Mr. President. Mr. Smajlovic ran over
8 the 45 minutes slightly by maybe a minute or two. In
9 the spirit of cooperation and in order to avoid
10 interrupting his presentation, we made no objection,
11 but we would just respectfully ask that should Brattle
12 overrun in their presentation, that we have the same
13 indulgence.

14 PRESIDENT McRAE: Any comment?

15 MS. HORMAZABAL: I'm sorry, can you please
16 repeat?

17 MR. SMYTH: Of course. I was just
18 explaining that Mr. Smajlovic slightly overran the
19 45-minute time limit. We didn't raise any objection
20 in order to avoid interrupting him. And in the spirit
21 of cooperation, we would just respectfully request
22 that the same indulgence be provided to Brattle should

1 they overrun slightly.

2 MS. HORMAZABAL: That's fine.

3 MR. SMYTH: Thank you.

4 (Pause.)

5 PRESIDENT McRAE: So, Respondent, when
6 you're ready.

7 MR. SMYTH: Yes.

8 CROSS-EXAMINATION

9 BY MR. SMYTH:

10 Q. Good morning, Mr. Smajlovic. My name is Tim
11 Smyth, counsel for Perú and I'm going to be asking you
12 some questions about the two Reports that you have
13 submitted in this Arbitration. You should have both
14 of those Reports in front of you.

15 I will also direct you to certain documents
16 which will be displayed on the screen in front of you.

17 To start with, I would like to ask a couple
18 of questions about your background and experience. As
19 looking at the experience you referred to in your
20 Reports and couldn't see any reference to you having
21 worked in the gold and precious metals sectors. Is it
22 correct that you haven't previously been employed in

1 those sectors?

2 A. That's correct.

3 Q. I also couldn't find any examples of where
4 you've testified in arbitration cases involving the
5 gold or precious metals sectors; is that correct?

6 A. That is correct.

7 Q. And, nonetheless, are you familiar with
8 certain terminology that's used in the industry, such
9 as off-take agreements, long-term supply agreements,
10 and the like?

11 A. Yes.

12 Q. And you also have some experience of cases
13 involving financial institutions; is that correct?

14 A. That's correct.

15 Q. So, you have some understanding of how
16 financial institutions operate.

17 A. Which one in particular?

18 Q. Just as a general matter.

19 A. I've done seven, eight banking valuations.
20 So, if that's what you refer to, I would say "yes,"
21 then.

22 Q. Okay. Thank you.

1 I would like to talk about the issue of
2 causation. So, you're aware that in this Arbitration
3 Kaloti argues that Perú's actions caused their loss;
4 correct?

5 A. Yes.

6 Q. Please, can we pull up Exhibit AS-25, which
7 is one of the exhibits to your First Report: This is
8 a forensic valuation and services practice aid
9 published by the AICPA. If you go to the next page,
10 you can see that in the top left-hand corner. What
11 does AICPA stand for?

12 A. American Institute for Certified Public
13 Accountants, I believe, or something like that.

14 Q. Thank you.

15 And you're a CPA; correct?

16 A. That's correct.

17 Q. And you exhibit this document with your
18 First Report, so you accept that the principles
19 referred to in it are applicable to this arbitration?

20 A. Yes.

21 Q. On the third page of the PDF, if I could go
22 to that, please, under the heading "causation," it

1 says, and I will read it to you so it's in the record:
2 "The plaintiff's damages are to be approximately
3 caused by the defendant's act. The plaintiff carries
4 the burden to prove that but for the wrongful conduct
5 of the defendant, the plaintiff would likely have
6 realized the lost profits or other economic income.
7 Experts may be asked to assume causation or opine upon
8 causation. If an expert assumes causation, the expert
9 should understand the causation theory and be able to
10 explain how the computed economic damages are
11 attributable to the alleged cause. For matters in
12 federal court, experts should be familiar with the
13 2000 comments to Rule 702 of the Federal Rules of
14 Evidence that specifically identify as one test of
15 reliability 'whether the expert has adequately
16 accounted for obvious alternative explanations' for
17 the plaintiff's damages."

18 So, first of all, you would agree, based on
19 this, that damages experts can opine on causation as
20 an economic matter?

21 A. Assuming there is sufficient information for
22 it, yes.

1 Q. Right.

2 And, in this case, you were instructed to
3 assume causation as established; correct?

4 A. I've assumed causation was established for
5 certain things, for some of those I actually was able
6 to identify the impact of certain Measures.

7 Q. So, have you assumed causation or not? It's
8 really a "yes" or "no" question.

9 A. I have assumed causation. And as part of my
10 work, I believe it was Annex 1 of my First Report, I
11 identified the impact of inventory-taking or the
12 negative impact of inventory-taking on the cash flows
13 of Kaloti Metals & Logistics, on the financing charges
14 which increased as a result of inventory-taking, and
15 as on operating performance of the Company, which
16 deteriorated specifically increasing Working Capital
17 which really was one of the most, I would say,
18 impactful of all negative impacts of the Measures.

19 Q. And so, if we just go back to this extract
20 from the AICPA guidance, it says that, in the last
21 sentence, where causation is assumed, one test of
22 reliability is whether the Expert has adequately

1 accounted for obvious alternative explanations for the
2 Plaintiff's damages.

3 So, you would agree that, if you're
4 instructed on causation, you need to adequately
5 account for alternative causes for the Plaintiff's
6 damages; correct?

7 A. Yes.

8 Q. And do you consider that you have done that
9 in your Reports?

10 A. Considering the information that was
11 available, to extent of the information that was
12 available, that's exactly what I have done.

13 Q. Okay. And if we go to Paragraph 2.31 of
14 your Second Report, if we could get that up on the
15 screen, 2.31. If you could scroll through--bear with
16 us--so, here it says--this is under your legal
17 instructions, and it says: "Last, I have not seen
18 evidence provided by Brattle to suggest that the loss
19 of KML's gold Suppliers was caused by a different
20 factor."

21 So, where in your Reports do you analyze the
22 alternative causes raised by Brattle and the evidence

1 that they put forward?

2 A. I do not analyze them. All I have done is
3 the proposed suggestions for alternative reasons such
4 as--I will give you one example. Brattle states that
5 affiliation with [REDACTED] is likely the reason why business
6 went under. I did not--there was no information that
7 was provided by Brattle that would indicate that that
8 alternative cause which they suggest is an alternative
9 cause, should be considered.

10 They provided competition as part
11 the--potential for competition as part of the reasons.
12 When I analyzed--first of all, the competition has
13 always been impacted--exists in every world, and the
14 competition existed in 2012 and 2013. That was not
15 the reason why the volumes have decreased.

16 And on top of my head, I can't remember all
17 the other reasons, but all of the reasons that they
18 proposed, I analyzed them, I looked at it, I looked at
19 the evidence that they exhibited. There was nothing
20 that would convince me that the alternative--based on
21 what they stated, that would make me change my
22 numbers, and that's basically what I stated here.

1 Q. Mr. Smajlovic, that was a rather long
2 answer. I would just urge you, in the interest of
3 time, to, where possible, keep your answers short.

4 You described certain information
5 alternative causes that you say you analyzed, but my
6 question was much narrower than that.

7 Where are those alternative causes analyzed
8 in your Reports?

9 A. Specifically which alternative causes?

10 Q. Any of them.

11 A. Give me one.

12 Q. Where is it analyzed in your Report?

13 A. The--you have to give me one, with due
14 respect. You have to give me which causes you're
15 referring to.

16 There are million things that, as a
17 valuator, there are hypothetical million things that
18 we have to consider. So, unless you have something
19 specific, I--really it's hard for me to answer that.

20 But, in relation to what Brattle was
21 suggesting, I have not disregarded their comments, I
22 looked into it, I looked at the evidence which in many

1 cases referred to some articles which, as a CPA, as
2 somebody who abides by the regulations, the articles
3 were not sufficient for me to say that there is
4 alternative causes.

5 Q. Okay. We will come to some specifics.

6 In terms of your specific legal instructions
7 on causation, you were instructed that Perú's actions
8 met a loss of Suppliers both in Perú and in other
9 countries, correct?

10 A. That's correct.

11 Q. And you were also instructed that Perú's
12 Measures caused the termination of banking
13 relationships; correct?

14 A. That's correct.

15 Q. And, in terms of the Measures that Kaloti
16 alleges caused these terminations, this is the
17 seizures of gold, the first that took place on 27th of
18 November 2013 and further seizures on 9th of
19 January 2014. Does that sound about right?

20 A. I believe it was 7th of January and 8th of
21 January.

22 Q. But early January? We agree on that?

1 A. Yes, yes.

2 Q. So, I would like to look at the first of the
3 two issues that we identified, so starting with
4 Suppliers. If we pull up Paragraph 5.3 of your First
5 Report--and this is on PDF Page 29--here, you state
6 that your "damages framework is primarily centered on
7 KML's loss of customers/Market Share." When you refer
8 to customers here, do you mean Suppliers of gold to
9 Kaloti?

10 A. That's correct, yes.

11 Q. And so your assumption that KML lost
12 Suppliers due to Perú's actions is central to your
13 damages calculations; correct?

14 A. That would be correct.

15 Q. And so, if it emerged that Perú's actions
16 did not cause Supply Contracts to be lost, this would
17 have a big impact on your damages calculations; is
18 that fair?

19 A. If that's the finding, yes.

20 Q. If we go to Paragraph 9.1 of your First
21 Report--this is at PDF Page 73--it says: "Any
22 additional information and documents produced after

1 the date of this Report may have a material impact on
2 the analyses and conclusions contained herein." Do
3 you stand by that statement?

4 A. That's the standard--I do--standard
5 boilerplate that I always use.

6 Q. Yes, but as part of your Reports?

7 A. Yes.

8 Q. So, Paragraph 3.6 of your Second Report, if
9 we could just pull that up, please--it's PDF 23--you
10 say that you understand that there were "numerous
11 cancellations of Claimant's Supply Contracts."

12 Have you seen such Supply Contracts?

13 A. I have seen the--not necessarily the
14 Contract per se. I have seen, I believe they referred
15 to such as open orders and things like that, with
16 ongoing orders with the customers, but I have not seen
17 the actual long-term Supply Contracts.

18 Q. Okay. And do you know that such long-term
19 Supply Contracts exist?

20 A. During the initial 15 months of operation
21 where they dealt primarily with small and artisanal
22 producers, they have not engaged in these long-term

1 contracts as far as I know.

2 Q. Okay. And just to clarify something for the
3 record, I think you mentioned that you had open
4 orders, ongoing orders with customers. Are those
5 listed in your Annex AS-2, which is the list of
6 documents that you looked at? Do you know? Do you
7 recall it? We can go to it, but I'm just curious if
8 you know off the top of your head.

9 A. What exactly was the list? Sorry?

10 Q. I was looking at the words you used, so open
11 orders, ongoing orders with customers, and I think you
12 said that you had seen these. I just wanted to
13 establish they are actually referred to in Annex 2 of
14 your Report.

15 A. I'm not sure whether they referred to as
16 Annex 2, but I have exhibited some of the examples.

17 Q. Okay. Just for the sake of good order,
18 could we just go to AS-002. And we can just scroll
19 through it quickly, and perhaps you could identify
20 which documents you're referring to. Zoom in a bit, I
21 think it's all quite small.

22 So, if we just scroll through it slowly, and

1 if you could just let us know when you find--

2 A. You can skip all the way to AS-7 is all the
3 modeling. You are going to have pause there, please,
4 I have to read it.

5 (Witness reviews document.)

6 A. Scroll down, please.

7 (Witness reviews document.)

8 A. Scroll down.

9 Maybe 53, if I remember--maybe 53 is one
10 example. If you don't mind opening 53.

11 Q. Of course.

12 A. And also, I do recall in some instances
13 the--there were bundles, they were repetitive, but
14 bundles of documents that I had and their counsel, so
15 I'm not sure whether in some cases referred to counsel
16 because some of them were duplicates, so there might
17 be some references to C-documents as well where some
18 of the information is listed.

19 Q. Yes, but you listed C-documents in your
20 Annex AS-2; right? So, the documents you just
21 referred to, are they listed in AS-2 as C-documents
22 that you reviewed when preparing your Reports?

1 A. Let's start with 53 first, I guess--

2 Q. Well, can you answer that question?

3 A. I do not know.

4 Q. You don't know.

5 A. I don't know. The difficulty that had with
6 many of these Cs, is you just have a C-53. Generally
7 my other cases, you will see exact name behind, so
8 it's difficult for me to say--ah, this is easier,
9 since you're pointing out to my particular appendix, I
10 can see what it is, but the bundle itself has just a
11 number--

12 Q. Just so I'm clear, you're unsure of whether
13 AS-2 lists all of the C exhibits that you looked at?
14 Is that correct?

15 A. No, no, that's not what I said. No. What I
16 said is that in some cases we may have referred to
17 those documents were not maybe exhibited by me but
18 were exhibited by the Claimant's counsel.

19 Q. Okay. But where you've referred to those
20 documents you have done so in the footnotes to your
21 Report; is that what you're saying?

22 A. Yes.

1 Q. But you're unsure whether Annex A--

2 (Overlapping speakers.)

3 Q. So, if I've understood correctly, you said
4 that you may have referred to certain C exhibits in
5 your Reports, but you are unsure of whether your list
6 of exhibits at AS-2 captures all of those C exhibits
7 referred to in your Reports?

8 A. That could possibly be an explanation, yes.

9 Q. Okay. And if we just quickly look at AS-53,
10 which you mentioned, this is an agreement for the sale
11 and purchase of precious metals between KML and
12 Stedson's Jewellery. It says on the cover page here
13 it's dated 12th of May 2017.

14 Do you see that?

15 A. Yes.

16 Q. So, this is a contract that post-dates the
17 relevant Measures. It's not from prior to the
18 Measures? Would you agree?

19 A. We could scroll--

20 Q. That was it. I think we were overlapping
21 slightly. So, that was a "yes"; correct?

22 A. Yes.

1 Q. Okay.

2 So, that's the Supply Contracts. Have you
3 seen any communications, written communications from
4 Suppliers canceling contracts?

5 A. Sorry, can you repeat that?

6 Q. We were talking about Supplier Contracts
7 just now, and you've confirmed you were instructed
8 that certain Supplier Contracts were terminated. Have
9 you seen communications from Suppliers canceling or
10 terminating those Contracts?

11 A. I have not.

12 Q. Okay. So, you have seen no documentary
13 evidence to support the assertion that Suppliers
14 canceled those contracts because of Perú's Measures?

15 A. During my visit of their offices in Miami, I
16 do recall seeing a WhatsApp message which indicated
17 that one of the Suppliers was not willing to
18 communicate with them or deal with KML any longer. I
19 do not recall what year that was. I know it was
20 sometime between 2013 and 2018, and that was the only
21 thing that I have seen, a WhatsApp.

22 Q. One WhatsApp?

1 A. One WhatsApp, and they suggested they also
2 had the whole office with all the records that we can
3 go through and identify those, but that was not part
4 of my tasks.

5 Q. Right.

6 A. So, I have not done that.

7 Q. And this office was in Miami?

8 A. In Miami, yes.

9 Q. So, Claimant represented to you that there
10 was a whole file of documents in that office that you
11 could review, if you wished to?

12 A. If I wish to review, yes.

13 Q. But you didn't ask to do so.

14 A. That was not part of my scope.

15 Q. Okay. And these files, to your
16 understanding, as communicated to you by Claimants and
17 their counsel, they included communications with
18 Suppliers canceling Contracts; is that right?

19 A. I do not know what they included. They
20 included all the financial records and the way they
21 communicate about the Orders which I understand a lot
22 of time was through WhatsApp and other means.

1 Q. Yeah, but they might have been--you think
2 that they could have been relevant to Suppliers'
3 cancellations of those Contracts; is that right?

4 A. For the purpose of what I have done, I
5 didn't need those because I actually had the financial
6 records. For the purposes of cancellations, possibly.

7 Q. Okay.

8 If we take a look at Exhibit C-30, please.
9 This is a list of Kaloti Suppliers, and it's broken
10 down by purchases, total purchases for each year from
11 2012 to 2018, if we could scroll down a little bit.

12 Have you seen this document before?

13 A. Yes.

14 Q. But it's not included in your Annex AS-2;
15 correct?

16 A. I believe total volumes that I used in the
17 actual world correspond to these numbers.

18 Q. Right. But you don't refer to this document
19 in your Reports; is that correct?

20 A. I do not recall, but yeah.

21 Q. Okay.

22 So, if we go to PDF Page 5, this is the list

1 of Suppliers for 2013, so this is largely before the
2 relevant Measures; correct?

3 A. Well, what date is it?

4 Q. 2013. So, this compiles--

5 A. That would be incorrect. That's inclusive
6 of Measures.

7 Q. I used the word "largely"--

8 (Overlapping speakers.)

9 So, if we accept that the first of the
10 Measures was 27th of November in 2013, you would
11 accept that this period of 2013 was largely before the
12 relevant Measures?

13 A. I agree with that.

14 Q. Yeah.

15 So, let's look at some of the Suppliers for
16 that year. Do you see, second entry down, we will
17 focus on the pure weights here, you have A&M imports
18 (gold), and you have an entry, pure weight of around
19 half a million grams.

20 Do you see that?

21 Pure quantity.

22 A. Yes.

1 Q. And then, a little bit further down, you
2 have BRG exports and imports, and here it has a figure
3 for pure of 1.5 million grams.

4 Do you see that?

5 A. I do.

6 Q. And that's quite a big Supplier compared to
7 the other Suppliers you see on this list; is that
8 fair?

9 A. I mean, I have seen 5 million, I see
10 3 million AC trading--yes, I guess, generally, I would
11 say, yes. At least on this sheet.

12 Q. Sure.

13 And then, if we go over the page, about
14 halfway down, we see an entry for Mohamed Enterprise
15 and an entry of 3.2 million grams.

16 Do you see that?

17 A. I do.

18 Q. And that's about 10 percent of the total
19 purchase of the year. Would you agree?

20 A. I cannot agree with that. You have shown
21 me--

22 Q. Sure, we can scroll down to the total which

1 is on Page 3.

2 So, you see grand total is just short of
3 30 million, pure quantity.

4 A. Yes, yes.

5 Q. And let's look over the page at 2014.

6 So, would you agree that this is after the
7 first of the Immobilizations of gold, 2014?

8 A. Yes.

9 Q. And that the subsequent Immobilizations
10 we've discussed were in early January, so is it fair
11 to say that most of the Suppliers on this page were
12 likely carried out after those relevant
13 Immobilizations?

14 A. Yes.

15 Q. Thank you.

16 And so, if you see here we have entries
17 again at the top for A&M Imports, and then a little
18 bit further down, we have an entry for BRG again.

19 So, both of these companies, it appears,
20 continued to trade with Kaloti after the seizures;
21 correct?

22 A. Correct.

1 Q. And then over the page, about halfway down,
2 you see that Mohamed Enterprise supplied
3 5.981 million grams pure in 2014.

4 Would you accept that that's nearly double
5 the 2013 amount?

6 A. Nearly. What was it?

7 Q. It was 3.2. This is 5.9.

8 A. Okay. Yes. Nearly.

9 Q. Nearly, yes.

10 So, you would accept that these Suppliers do
11 not appear to have continued trading with Kaloti as a
12 result of those Immobilizations; correct?

13 A. Sorry, can you repeat that?

14 Q. So, would you accept that these Suppliers
15 that we've just looked at continued to trade with
16 Kaloti after the relevant Immobilizations; correct?

17 A. Yes, that's what the data shows.

18 Q. Okay. And do you know if Mohamed Enterprise
19 continued to trade in subsequent years after 2014?

20 A. Yes.

21 In fact, I asked questions to [REDACTED]
22 specifically about Mohamed Enterprises.

1 Q. But the answer to my question, is that yes?

2 A. Yes.

3 Q. You're aware it continued to trade until
4 2018?

5 A. Yes.

6 And I can give you some additional
7 information if you would like to.

8 Q. I think counsel for the Claimant may direct
9 you to that on direct, but we can move on for present
10 purposes.

11 Have you heard of the companies Darsahn 2,
12 Darsahn International, [REDACTED], Titanium and Axbridge?

13 A. Yes, I have.

14 Q. Okay. If we go to the Supplier List for
15 2013, I think if we start on PDF Page 5, and do you
16 see those companies are listed here, so we have
17 Axbridge near the top, Darsahn 2 is about a third of
18 the way down--or sorry, three-quarters of the way down
19 the page there, and then we have [REDACTED] and Titanium
20 over the page. [REDACTED] and then Titanium. So, you see
21 those four companies are included on the Supplier List
22 for 2013? Do you agree?

1 A. Agree.

2 Q. And based on the figures there--I'm not
3 going to ask you to precise math at that point, but
4 would you accept that they supplied a large proportion
5 of Kaloti's gold?

6 A. I think you can say that, yes.

7 Q. Okay. So, would it also be fair to say that
8 a large amount of Kaloti's success in 2013 was due to
9 its Supplier relationships with these companies?

10 A. Well, I believe that's really a question for
11 [REDACTED] Judging from the numbers, you can say
12 that they were impactful, yes.

13 Q. They were impactful from an economic
14 perspective; correct?

15 A. Yes.

16 Q. "Yes." And were you aware that all of these
17 companies were either dissolved or ceased exporting
18 gold in 2014?

19 A. Yes.

20 Q. Okay. And you are aware that these same
21 companies were the subject of a criminal investigation
22 in relation to alleged money-laundering by members of

1 the Chamy family in Perú?

2 A. I've heard that, yes.

3 Q. But you didn't consider this issue in your
4 Reports, whether the criminal investigations could
5 have affected their ability to continue trading with
6 Kaloti?

7 A. The trades that they executed, company
8 executed, with any of these companies that you just
9 mentioned, directly serve as an offset to damage, so I
10 did consider them because company in the actual world,
11 company was making positive cash flows. So, any of
12 these Transactions that you just pointed out serve as
13 a direct offset to damages.

14 Q. What about the fact that they discontinued
15 trading with Kaloti in 2014? Did you--did you
16 consider that fact?

17 A. I did.

18 Q. In the actual scenario, you're saying.

19 A. In the but-for scenario.

20 Q. "In the but-for scenario."

21 And then taking a step back for a moment and
22 considering the Peruvian gold market as a whole, from

1 what you have seen, is it common for Suppliers of gold
2 to continue trading in the market for a long period?

3 A. I cannot answer that question because the
4 information that was available, there was insufficient
5 information that was availability that would allow me
6 to answer that question.

7 Q. Okay. Well--

8 A. All I can talk is what we have seen with
9 Kaloti Metals.

10 Q. Yes. I can take you to a document, so this
11 is Exhibit R-251. And this is an article by Victor
12 Torres entitled "The illegal gold economy in Perú:
13 Socioeconomic impact." And if we go to Page 2 of the
14 PDF, it talks about certain exporters who carry out
15 gold export activity just a few times and are never
16 heard from again. And then there's a table, if we
17 zoom in a little bit for Mr. Smajlovic.

18 The table on the page indicates that out of
19 a total of 167 Suppliers in 2013, 68.3 percent of them
20 only supply for one or two years. Do you agree?

21 MS. HORMAZABAL: Objection. This is not a
22 part of his Report.

1 MR. SMYTH: This is a question about the
2 volatility in the market, and Mr. Smajlovic has
3 confirmed that he did consider alternative causes in
4 his Reports and the evidence put forward--

5 MS. HORMAZABAL: He does not opine on that
6 in his Report.

7 MR. SMYTH: He does not opine on alternative
8 causes? He just confirmed that he did.

9 MS. HORMAZABAL: On this article.

10 MR. SMYTH: I don't believe he's mentioned
11 this article, but he has given testimony about
12 alternative causes. This goes to one of those
13 alternative causes.

14 MS. HORMAZABAL: I maintain my objection.

15 PRESIDENT McRAE: It seems to me the
16 information in this article is relevant to what he was
17 saying. He may not have seen the article. He's not
18 being asked to do anything other than look at the
19 figures there and relate that to what he said, so I
20 don't see this is a problem.

21 MS. HORMAZABAL: I've read Brattle's Report.
22 This was also not a subject in Brattle's Report. But

1 I will drop the objection, if that's what you prefer.

2 PRESIDENT McRAE: Please proceed.

3 MR. SMYTH: Thank you, Mr. President.

4 BY MR. SMYTH:

5 Q. So, 68.3 percent, would you agree that
6 that's--that the figures in this table represent a
7 high churn rate of Suppliers in the gold market in
8 Perú?

9 A. I do not know what these are, to be honest.
10 I do not see a word "churn" anywhere.

11 Q. Okay. We'll phrase it a different way.

12 So, do you accept--if you assume that this
13 information in this table is correct, that a Supplier
14 List for a company would change a lot from year to
15 year?

16 A. I think that's by its nature, this line of
17 business requires changes in Suppliers.

18 Q. So, you accept Suppliers change, they come
19 and go frequently in this market; correct?

20 A. It happens, yes. Some of them will maybe
21 not have sufficient volumes from you in this
22 particular year, so it's not worth to engage in the

1 small volumes, so in 2014, let's say, you and I will
2 not transact. You may have next--enough volumes from
3 me that was economical for me to deal with you, in
4 2015, we will transact again.

5 Q. Understood.

6 And you didn't examine whether or not
7 Kaloti's changes in its Supplier List were caused by
8 turnover in the market generally, did you?

9 A. There was no information that was submitted
10 of the Peruvian market and the churns and turns--I
11 forgot the term they use--they would not enable me to
12 determine what you're asking. That's just simply not
13 information. Brattle has that information. Brattle
14 makes assumptions about these things, based on
15 information that they have, which again is articles
16 and things of that nature that do not have enough
17 information. If I had information, I would certainly
18 analyze and study it.

19 Q. So, you didn't analyze that issue because
20 you didn't have the information. Is that fair?

21 A. The--first of all, I think it's important to
22 understand that I do--my assessment is not taken from

1 a standpoint of an individual Supplier. The
2 assessment, as I refer to in my presentation, a
3 top-down approach, assumes that the Company will have
4 access and will be able to compete in Perú and have
5 access to all of the Suppliers other than those that
6 have entered into long-term contracts.

7 So, I have never gotten to a level of
8 details which was not necessary to say they will
9 maintain this customer, this customer will provide
10 this much volume--it's just impossible. It's too
11 speculative for somebody to even try to do that. What
12 you could do is estimate the share of the volumes the
13 Company will have.

14 What production, annual production, will be
15 done by individual Supplier is not known, but in--on a
16 portfolio level, we could estimate what the volumes
17 are going to be.

18 Q. To be clear--and this really was my
19 question--you did not analyze the volatility in the
20 market and whether that might have caused the turnover
21 of Suppliers at Kaloti; correct? It's really a "yes"
22 or "no" answer.

1 A. The volatility is reflected in the annual
2 production which is taken without--from the actual
3 world. We know exactly what they produced, what Perú
4 production was, and my job was to estimate what
5 portion of the production, without which--without any
6 assumptions of what the production is. We do have the
7 tangible numbers up to 2019. And then I make an
8 estimate of what portion of that would have been
9 attributable to Kaloti Metals.

10 Q. You don't analyze any specific Suppliers and
11 the reasons they stopped supplying to Kaloti; is that
12 correct?

13 A. I do not.

14 Q. Okay. So, we were talking about alternative
15 causes earlier that are discussed by Brattle, so let's
16 have a look at some of the documents in relation to
17 that issue.

18 So, if we go to Exhibit BR-11. This is an
19 article by Global Witness dated February 2014.

20 Have you seen this article before?

21 A. I have.

22 Q. And if you look at the right-hand column on

1 the first page, which is at PDF Page 3, this mentions
2 a leaked Audit Report by Ernst & Young in relation to
3 [REDACTED], and it reports certain
4 findings from that Report, including Kaloti's failure
5 to report suspicious cash transactions of
6 \$5.2 billion. [REDACTED] knowingly accepting up
7 to four tons of gold coated with silver exported from
8 Morocco with falsified paperwork, and [REDACTED]
9 [REDACTED] lack of adequate supply chain information
10 for high risk gold from Sudan.

11 And you said in your Second Report and the
12 extract that we've looked at, at Paragraph 2.31, we
13 can take you back to it if you wish, that you've not
14 seen evidence of alternative causes for Kaloti's loss.
15 What analysis did you conduct to conclude that matters
16 such as those included in this article did not cause
17 Kaloti's loss?

18 A. Well, starting with this article, and we are
19 talking about [REDACTED] based in
20 Dubai; right? This is what you're asking me.

21 Q. Well, I think before we start on what I
22 think may be your answer--

1 (Overlapping speakers.)

2 Q. I wish to clarify the question. You asked
3 me a question, so I'm just going to clarify what my
4 question was.

5 So, what analysis did you conduct, it's
6 about the analysis that you conducted when you were
7 compiling your Reports. What analysis did you conduct
8 to conclude that matters such as those included in
9 this article did not cause Kaloti's loss?

10 A. Several.

11 The first thing that I have done is to
12 assess the risk as Brattle, I believe, refers to it as
13 alternative reason why volumes have gone down because
14 they are sister company or affiliated company or
15 things like that.

16 The first point says that the Company [REDACTED]
17 was involved in illicit purchases, and this one says
18 "failed to report suspicious cash transactions worth
19 in total 5.2 billion in 2012."

20 Well, I looked at this and say, what
21 happened to Kaloti Metals & Logistics in 2012? If
22 their proposition is correct, I would see a massive

1 leave of all the customers if they truly believed that
2 these are identical companies or affiliated companies.

3 Nothing happened to Kaloti. In fact, they
4 purchased 256 kilograms in 2012. If this was correct,
5 I would expect to see much less but, in fact, the
6 volumes increased by multiple of 54 times. So, that
7 first point, it's not what caused--it's not legitimate
8 point.

9 They were taking some tons. I'm not sure
10 exactly what happened. I believe everything that I've
11 read here, it's not really clear, but everything is
12 from 2012. If [REDACTED], in summary--without going to each
13 detail--if [REDACTED] had such a detrimental impact on KML, I
14 would expect to see that detrimental impact in 2012
15 and 2013. 800 million in revenue has been recorded by
16 KML in 2012, and 1.33 billion in 2013.

17 This is what I'm referring to when I said
18 that I see articles and I see just soundbites of
19 things, zero evidence that I can actually say yes,
20 this is tangible, this is correct, I would need to
21 make corrections.

22 Q. If we can scroll up a little bit just so we

1 can get the date of this article. It's February 2014,
2 so you were talking about looking at the impact in
3 2012 and 2013. That's irrelevant to whether these
4 issues reported in this article caused any impact on
5 Kaloti's business--correct?--because this postdates
6 the uptick in revenues you were talking about.

7 A. I believe your question was that whether the
8 impact of the alleged illicit trades and underpayments
9 from [REDACTED] have had a negative impact on KML. All I
10 said is, when I looked at it--and it's relevant, 2012
11 is relevant, 2013 is relevant--nothing--you could see
12 no negative impact on KML for any of these alleged
13 illicit trades of whatever you want to call it, that
14 they accuse of [REDACTED].

15 Q. Your position is that KML's volumes were
16 lower in early 2014 than before. That's a
17 simplification, but is that correct?

18 A. That's a factual thing.

19 Q. Yes.

20 And this article is dated February 2014;
21 correct?

22 A. That's what it looks like, yes.

1 Q. So, you haven't analyzed whether this
2 article had any causal link with those lower volumes
3 in early 2014; correct?

4 A. I'm sorry, I just explained that I
5 considered the exhibit that were submitted by Brattle,
6 and the data that I found, information that I found,
7 did not support the allegations that were made by
8 Brattle, that affiliation with [REDACTED] somehow impacted,
9 that the so-called "bad acts of [REDACTED]" may have impact
10 and may have resulted in a loss of customer base.
11 Those are the statements they have made sourcing this
12 document.

13 And if you look at the document--let's look
14 at how are we going to do this as an expert; right?
15 You will look at it and say here is the allegation
16 2012. I should see the impact on the financial
17 records. None. Let's look at the next two, maybe
18 there's a spillover, maybe it takes time for this
19 to--for the information to come about. Actually,
20 volumes have gone up. No impact on KML.

21 So, in the context of this information, I do
22 not see any connection between any of the alleged bad

1 acts of [REDACTED] to the financial figures that we can see
2 are performance of KML.

3 Q. I've been reading through the Transcript of
4 your answer to my question. I didn't find it. So, I
5 will ask it in a different way.

6 So, this article is February 2014, and you
7 accept that KML's volumes were lower in early 2014
8 than they had been before. You understand that KML's
9 position is that the reason those volumes were lower
10 is because of the initial seizures. Can we at least
11 agree on that?

12 MS. HORMAZABAL: This was asked and answered
13 earlier by the Witness.

14 PRESIDENT McRAE: I think his point was, as
15 I understand it, he didn't see any answer in what was
16 said. I certainly heard, but I haven't looked back at
17 the Transcript to see that, but it's just clarifying
18 what I think was the question and seeing if--

19 MS. HORMAZABAL: Okay. I will drop the
20 objection.

21 BY MR. SMYTH:

22 Q. So, I guess I will cut to the chase: We

1 agree that there were lower volumes in early 2014, and
2 the question is: What caused that? So, KML's
3 position is that that was caused by Perú's Measures
4 with the initial seizures of gold. We also have this
5 article from February 2014 which reports certain
6 matters in relation to the [REDACTED]

7 My question to you is: Have you analyzed
8 what caused those lower volumes in early 2014 and
9 whether it was the Immobilizations or these reports in
10 relation to the [REDACTED] If you can give a short
11 answer, I think that would allow us to move--

12 A. These volumes have decreased in 2014
13 immediately, and they have--the decline has occurred
14 in 2014--I cannot tell you exactly in which month
15 because I don't have the granular data. So, over the
16 course of the year, volumes have decreased. And all I
17 can say is that I can tell that, based on the
18 information that was provided, that I could not see
19 any link to [REDACTED]. Whether there are any alternative,
20 that's up to the Tribunal to decide, but I cannot
21 see--my analysis didn't show any negative effect of
22 Kaloti Metals being affiliated with [REDACTED].

1 Q. And did you see any negative effect on
2 Kaloti's business from the Immobilizations?

3 A. Yes.

4 Q. Where is that reflected in your Reports?

5 A. I would refer to Annex 1 of my First Report,
6 and I believe in my presentation I have referred to
7 negative 8 million that, right after the taking of the
8 inventory, in 2014, company experienced a massive cash
9 outflow.

10 I believe that--I recall counsel saying on
11 Monday that it was only a certain percentage of the
12 gold that was taken. Members of the Tribunal, it was
13 100 percent of the Working Capital of the Company that
14 was taken, regardless of the size or reference to the
15 total volume. The Company was experiencing
16 significant cash outflows as a result of paying for
17 the gold and not having that gold to be put into the
18 Working Capital.

19 Q. So, we've been talking here about volumes,
20 okay? So, we're not talking about the issues that are
21 mentioned in Annex 1 to your Report here. Let's focus
22 on volumes.

1 Have you seen any evidence that the
2 Immobilizations affected KML's ability to source
3 purchase volumes in Perú?

4 A. Other than--other than the Witness
5 Statements, factual Witness Statements referring to
6 that, I have not personally.

7 Q. Okay. Thank you.

8 And we were talking about the links between
9 [REDACTED] and KML, and I believe your testimony
10 was that those links--you haven't seen any evidence
11 that those links would have affected KML's business?
12 Is that a fair summary? I'm paraphrasing.

13 A. That would be correct, yes. In fact, I have
14 seen only positive things that came out of it. And
15 the reason why companies survived all the way through
16 2018 is because continuous funding of Kaloti Metals &
17 Logistics by [REDACTED].

18 Q. Do you accept that reports of the matters
19 that we just saw arising from the EY audit of [REDACTED]
20 [REDACTED] could have adversely affected the reputation
21 of [REDACTED]?

22 A. [REDACTED]?

1 Q. Yes.

2 A. Possibly, yes.

3 Q. And do you not accept that they could also
4 have adversely affected Kaloti Metals & Logistics's
5 reputation, given the similarity in names between the
6 two?

7 A. The short answer is I did not see that, so i
8 really cannot answer that question. I did not see any
9 evidence that that actually--that that occurred.

10 Q. And if we could go to Paragraph 39 of
11 [REDACTED] First Witness Statement, which I believe
12 you've reviewed. Paragraph 39, here [REDACTED]
13 explains that he specifically asked [REDACTED]
14 to provide a letter evidencing [REDACTED]
15 intention to purchase 45,000 kilos of gold from KML,
16 and this was to be shown to third parties as needed.
17 And we understand that that would include Suppliers.

18 If Suppliers were shown the letter intending
19 to buy 45,000 kilos of gold, they would know that the
20 gold that they supplied could ultimately be purchased
21 by [REDACTED]

22 A. I think that's a fair statement, yes.

1 Q. And given the types of allegations that
2 we've just discussed, would that potentially be a
3 source of concern to Suppliers?

4 A. I have not seen any evidence of that, but,
5 in theory, yes.

6 Q. Okay. I would like to spend a little bit of
7 time now focusing on KML's banking relationships.

8 PRESIDENT McRAE: Could I just ask you what
9 your plan is in terms of time? Because we're close to
10 a break for 15 minutes, and you suggested you're going
11 to start a series of questions.

12 MR. SMYTH: I would say we could either take
13 a break now or we could take a break in, say, half--20
14 minutes/half an hour. We're in your hands.

15 REALTIME STENOGRAPHER: No.

16 PRESIDENT McRAE: I think we should take the
17 break now. I didn't even look at David to reach that
18 conclusion.

19 MR. SMYTH: Fine. Thank you.

20 PRESIDENT McRAE: So, let's take a 15-minute
21 break.

22 Mr. Smajlovic, since you are giving

1 testimony, you have to keep isolated for this period
2 of time, and you will be taken to a room and you can
3 get coffee and so on.

4 THE WITNESS: I understand that. I will be
5 sitting outside over here.

6 PRESIDENT McRAE: Right, okay. Thank you.

7 So, 5 after 11:00 we will reconvene. Thank
8 you.

9 (Recess.)

10 PRESIDENT McRAE: Whenever you're ready,
11 Mr. Smyth.

12 MR. SMYTH: There is just one point of order
13 before we begin, Mr. President, which is just that we
14 noticed there is a discrepancy between the version of
15 Mr. Smajlovic's PowerPoint presentation that was
16 emailed to us a little over an hour before we began
17 today, and the hard copies that were handed out, and I
18 believe the presentation was actually used during the
19 presentation. We don't raise any objection at this
20 point because we will need to examine the nature of
21 the changes and differences, but we reserve the right
22 to raise an objection.

1 PRESIDENT McRAE: Thank you. That's noted.

2 BY MR. SMYTH:

3 Q. As I said before the break, Mr. Smajlovic, I
4 would like to spend a little bit of time focusing on
5 KML's banking relationships.

6 First of all, would you agree that access to
7 banks is one of KML's biggest risks?

8 A. I would disagree with that.

9 Q. Could we pull up your First Report
10 Paragraph 5.24.

11 A. It is one of them, not the one--

12 Q. I said one of the biggest risks. Would you
13 agree with that statement?

14 A. I would agree with that.

15 Q. Okay. Thank you.

16 If you could go to 3.6 of your Second
17 Report, please. Here, you note that Perú's Measures
18 led to "the loss of financing arrangements with many
19 banks."

20 Just to clear up one issue here, you
21 mentioned financing arrangements. Are you talking
22 about loans from banks?

1 A. No.

2 Q. "No."

3 So, are you referring to KML's allegation
4 that banks decided to close KML's accounts?

5 A. That's correct.

6 Q. Okay. So, if we go to the document that
7 Claimant relies on in support of that argument, it's
8 Exhibit C-27.

9 This is a bundle of letters from banks with
10 whom KML had an account. So, if you go to the next
11 page, please.

12 Have you seen this document before?

13 A. Yes, I have.

14 Q. Is it listed in your Annex AS-2?

15 A. It might be. I do not recall.

16 Q. Well, I can represent to you that it is not.

17 Is it listed in the footnotes to your
18 Reports at all, as far as you're aware?

19 A. If it's not on the scope of review, it
20 should not be in my Report.

21 Q. Okay. Thank you.

22 So, this document is a collection of letters

1 sent over the span of four years to Kaloti. So, if we
2 take a look at this first letter from BB&T, this is
3 dated August 2018; correct?

4 A. Yes.

5 Q. And that's nearly five years after the
6 initial Immobilizations of gold; is that correct?

7 A. Approximately, yes.

8 Q. "Approximately, yes." Thank you.

9 And does this letter indicate that Perú's
10 Measures are the reason the bank is closing Kaloti's
11 account?

12 A. I do not see reference to Perú.

13 Q. Thank you.

14 And then, if we go to the next page, PDF
15 Page 2, this is a letter from Fifth Third Bank dated
16 9 May 2017.

17 Does this mention the Measures by Perú being
18 the reason for the closure of the accounts?

19 A. I do not see any reference to Perú or [REDACTED].

20 Q. Okay. To save time, I can represent to you
21 that none of the letters in this bundle refer to
22 Measures taken by Perú.

1 That being so, would you accept that the
2 letters are not, in fact, evidence that the bank
3 closures were linked to Perú's Measures?

4 A. Sorry, can you rephrase the question again?

5 Q. Would you accept that the letters are not,
6 in fact, evidence that the bank closures were linked
7 to Perú's Measures?

8 A. I would accept that the reference to Perú's
9 Measures is not listed in there, but whether that was
10 a reason, I really cannot opine on that.

11 Q. You can't opine on that. Okay. Thank you.

12 So, if we could go to Exhibit R-260, this is
13 a news article from Convoca, dated 21 September 2020,
14 and it's entitled "Suspicious payments from U.S. gold
15 collector to Peruvian companies investigated for"
16 money-laundering--sorry, just "laundering and illegal
17 mining."

18 Have you seen this document before?

19 A. I have not.

20 Q. Okay. And if you go to Page 3, it
21 discusses--if we zoom in a little bit for
22 Mr. Smajlovic--it discusses banks, including JPMorgan,

1 Standard Chartered, and Deutsche Bank, and says that
2 they made reports regarding "suspicious million-dollar
3 transactions carried out by [REDACTED] [REDACTED]
4 Dubai and Kaloti Metals & Logistics.

5 Do you see that?

6 A. That's what the Article says, yes.

7 Q. Thank you.

8 And if you go to Page 4, so this is a
9 redacted version of a Suspicious Activity Report, or
10 "SAR," submitted by JPMorgan in February 2013. About
11 halfway down, it mentions concerns that Kaloti Metals
12 & Logistics's account with JPMorgan is a pass-through
13 account.

14 Do you see that?

15 A. I do.

16 Q. And then, in the highlighted section at the
17 bottom of the page, it says that the types of entities
18 that benefited from Kaloti Metals & Logistics wires
19 included entities located in banking secrecy havens,
20 Peruvian and Bolivian gold dealers, and shell
21 companies without a public-domain presence and who
22 were in scrap gold, a high risk industry, and that

1 these factors combined reduced transparency regarding
2 the destination of the funds.

3 And this SAR was dated February 2013, so
4 before the Measures that Claimant alleges caused the
5 damage; yes?

6 A. I would take that--I do not know--

7 Q. If we go to the previous page, we could say,
8 penultimate paragraph, in February 2013, so the SAR is
9 dated before the relevant Measures; correct? At least
10 according to this Article.

11 A. So, you're asking me to assume that the SAR
12 that you show at the bottom refers to the one that is
13 from February of 2013?

14 Q. Correct.

15 I mean, you can read the Article to see if
16 you disagree with that, but can we proceed on that
17 basis?

18 A. Sure.

19 Q. So, it was before the relevant Measures.

20 A. Yes.

21 Q. "Yes."

22 And are you aware that KML's accounts with

1 JPMorgan were closed at around this time?

2 A. Who closed it?

3 Q. So, KML's account with JPMorgan was closed.
4 We can get on to who closed it, but are you aware that
5 it was closed?

6 A. I was not aware of that.

7 Q. You were not aware of it.

8 A. Yes.

9 Q. Okay. And if we go to AS-61, this is KML's
10 2012 Balance Sheet. If we go to PDF Page 10, at the
11 top there you'll see there is an active balance listed
12 with JPMorgan.

13 A. Yes.

14 Q. And then, if we go to BR-58, this is KML's
15 2013 Financial Statement. Page 3 near the bottom,
16 there should be a reference to JPMorgan there, I
17 believe, with a "Zzz" in front of it and then a dash.

18 Do you see that?

19 A. I do.

20 Q. And then, if we go to AS-62, which is the
21 2014 Balance Sheet and PDF Page 4, here, there is no
22 mention of a bank account with JPMorgan; correct?

1 A. Where exactly are you referring?

2 Q. Well, we have certain bank accounts listed,
3 and there is no mention of a JPMorgan account.

4 A. It's not listed there.

5 Q. Okay.

6 A. I believe the previous year had a zero
7 balance like it shows.

8 Q. So, does it appear to you that JPMorgan's
9 account was closed, based on these Financial
10 Statements?

11 A. Now that you mention it, I actually remember
12 that. We had a discussion over these accounts. I do
13 recall [REDACTED] and Ms. [REDACTED] testifying that the
14 charges they were charged from this company, from
15 JPMorgan, were very high, I believe it was Wachovia as
16 well, if I remember, and a few other banks, they were
17 charging very high rates of fees which promulgated
18 Company to find a different relationship with
19 different banks around the time. Not only did they
20 charge higher fees, they were very slow in the
21 payment. And [REDACTED] one of his--the way he
22 portrayed to me, one of his comparative advantages

1 over the other one was always to make these prompt
2 payments and facilitate the payments very quickly,
3 which, with JPMorgan, I believe, Wachovia, was not
4 possible.

5 Q. Thank you.

6 When did you have this conversation? Was
7 this before this Hearing, or was this during the
8 Hearing?

9 A. That was August of last year.

10 Q. Okay.

11 A. I was visiting their offices for the third
12 time, I believe.

13 Q. Yeah--

14 (Overlapping speakers.)

15 Q. August, when? Sorry, August '22, of last
16 year, so before you compiled your Second Report; is
17 that right?

18 A. Yes.

19 Q. And you seem to have a very clear
20 recollection of the events, which is admirable, but I
21 don't think you mentioned this particular issue in
22 your Second Report; is that right?

1 A. That's correct, but also you have to--you
2 have to understand that this issue was never brought
3 up until the Second Brattle Report, where they
4 indicated that there is a closure of account.

5 The only thing that Brattle can see here is
6 there's a zero balance, but to go a step further and
7 to say that the banks have closed the relationship was
8 so aggressive and unsupported. In order for me to
9 make a statement that the banks have made a closure, I
10 would need to have a paper that says "we're closing
11 you for X, Y, and Z reasons." The only thing that you
12 can see in the Balance Sheet is the actual balance of
13 cash.

14 So, I couldn't answer that question. The
15 issue was never brought up until the Second Brattle
16 Report.

17 Q. Right.

18 A. Which promulgated me to go back to look at
19 these things, so it was never an issue.

20 Q. The Second Report, that was the Second
21 Brattle Report, that's May 2023; correct?

22 A. That's correct.

1 Q. But you were saying you had this detailed
2 discussion about the JPMorgan account back in August
3 2022, even though it hadn't been brought up in
4 Brattle's First Report; is that right?

5 A. That's right.

6 As part of my analysis and forecasting,
7 modeling, we went through each of these balance sheets
8 and accounts, to the extent possible, to enable me to
9 forecast the but-for cash flows.

10 Q. Okay. Are you aware that, in his testimony
11 during this Hearing, [REDACTED] also testified that
12 JPMorgan did not tell KML why it closed the account
13 with KML? Do you recall that?

14 A. I do not recall that.

15 MS. HORMAZABAL: Objection.

16 THE WITNESS: I do not--

17 MS. HORMAZABAL: Objection. That's
18 misrepresenting the testimony of [REDACTED]

19 MR. SMYTH: If it would help the Tribunal,
20 we can show the testimony on the screen.

21 MS. HORMAZABAL: Yes, please.

22 PRESIDENT McRAE: Well, I think you would

1 have to, actually.

2 MR. SMYTH: Yeah, understood. That's
3 absolutely fair.

4 So Day 2--if you could please give us a
5 minute, we will bring it up.

6 So, we're looking for Page 497.

7 BY MR. SMYTH:

8 Q. Okay. And I think we're looking for
9 Lines 15 to 17.

10 So, you will see from Line 10 it talks about
11 JPMorgan's assessment of suspicious activity, and then
12 counsel for Perú asked whether this SAR, which is the
13 same one we had been looking at, refreshes

14 [REDACTED] recollection as to why the account with
15 JPMorgan was closed, and Mr. [REDACTED] testified:
16 "They don't tell us. I don't know."

17 Does that not contradict the--

18 MR. DÍAZ-CANDIA: Can we continue the
19 objection? The objection that this statement that
20 he's reading, first, [REDACTED] is not considering
21 that that account was closed unilaterally by the bank,
22 and he clarified very explicitly this position in the

1 redirect. So, if it's going to be shown this
2 isolated, I think he should be also shown the part of
3 the redirect where [REDACTED] made the clarification.
4 Or we will show it to Mr. Smajlovic during the
5 redirect.

6 PRESIDENT McRAE: I think that's fair
7 because I remember hearing [REDACTED] saying that as
8 well, so I think if you're going to put one to them,
9 you should put both.

10 MR. SMYTH: Understood.

11 BY MR. SMYTH:

12 Q. Starting with this one, you see this
13 testimony here. So, [REDACTED] is asked whether this
14 SAR reflects his recollection as to why the account
15 with JPMorgan was closed, and [REDACTED] says: "They
16 don't tell us."

17 MS. HORMAZABAL: Again that's
18 misrepresenting the testimony.

19 MR. SMYTH: Well, if you want I can just
20 read it word-for-word.

21 MS. HORMAZABAL: Sure.

22 BY MR. SMYTH:

1 Q. So, Perú's counsel asked: "Does this
2 refresh your recollection as to why the account with
3 JPMorgan was closed?"

4 [REDACTED] testified: "They don't tell us.
5 I don't know."

6 MS. HORMAZABAL: He didn't say that he
7 closed the account. And if you can go to Page 187,
8 starting with Line 13 and forward, if you would like
9 to read that as well.

10 Thank you.

11 MR. SMYTH: Okay.

12 MS. HORMAZABAL: Day 2, Page 187, starting
13 with Line 13.

14 PRESIDENT McRAE: That's the redirect, is
15 it? I thought you were going to go to the redirect.

16 MR. SMYTH: Do you mind if before--either
17 before or after there is another part of the testimony
18 that I would like to take Mr. Smajlovic to.

19 PRESIDENT McRAE: As long as you're going to
20 go to the testimony--that's fine, yeah.

21 MR. SMYTH: First of all. If we could go to
22 Page 493. Right at the bottom, and we have a question

1 from Perú's counsel: "Okay. Do you know why the bank
2 accounts with JPMorgan was closed?"

3 And then, Line 2 on the next page from
4 [REDACTED] he says: "I don't know."

5 BY MR. SMYTH:

6 Q. So, [REDACTED] does not challenge here
7 whether or not the bank account was closed by
8 JPMorgan; is that right?

9 A. But clearly bank account was closed.

10 Q. But he doesn't suggest here that it was
11 closed by KML. He doesn't--the suggestion by counsel
12 in the question is that the account was closed and he
13 says he doesn't know why. So, he doesn't put forward
14 the answer that you gave just now, which we will go to
15 in redirect, that it was actually KML who closed the
16 accounts. He's saying he doesn't know. Do you accept
17 that?

18 A. I accept that he stated here that he doesn't
19 know the reason why the bank account is closed.

20 Q. Okay.

21 A. When I was in Miami, Mr. [REDACTED] runs
22 the business. However, when it comes to anything

1 related to the trading, anything related to specific
2 accounting, [REDACTED] is not the person that you
3 would go to. He relies on his accountants that--to
4 answer the questions.

5 So, when I was referring to the bank
6 accounts of Wachovia, bank account of JPMorgan that I
7 inquired, the answers came from his accountant,
8 Ms. [REDACTED], who was running the accounting side of
9 the business, if you will. And she managed the
10 software.

11 So, those answers came from Ms. [REDACTED].
12 The fact that [REDACTED] himself didn't know--from
13 what I have seen, he, back then, he wasn't involved in
14 that detail when I was talking to them in August.

15 Q. And do you know for a fact that [REDACTED]
16 does not handle the accounting issues for KML?

17 A. I do not know for a fact, but a few times I
18 asked the questions about certain treatments, he would
19 refer me to Ms. [REDACTED].

20 Q. Okay.

21 A. So, my assumption is base on--and from what
22 I have seen, each document that I ever needed, the

1 explanations of the certain bookings, would come from
2 Ms. [REDACTED] and not from Mr. [REDACTED]

3 Q. Understood, and just to kind of close the
4 loop on this, we can now take you to the redirect
5 testimony that counsel for Claimant referred to, just
6 so you can see that.

7 MS. HORMAZABAL: The exact page number is
8 529, PDF Page No. 187, Paragraphs, starting from
9 12-13.

10 BY MR. SMYTH:

11 Q. So, you will see the Transcript there on the
12 page.

13 A. Yes.

14 Q. Yes, okay. I think we can move on.

15 MS. HORMAZABAL: This ends on the next page.
16 If you would like, I could go ahead and read it.

17 Or, please read it, Mr. Smajlovic.

18 THE WITNESS: If I remember correctly, we
19 had some issue with the speedy--

20 PRESIDENT McRAE: Just a second. Counsel
21 can take him to it, but I don't think you can ask him
22 to read it out. If you want to do that, you have to

1 wait for your redirect.

2 MS. HORMAZABAL: Not a problem.

3 MR. SMYTH: Thank you, Mr. President.

4 BY MR. SMYTH:

5 Q. So, we were looking at the concerns of
6 JPMorgan and there were other banks mentioned in the
7 Article as well.

8 Is it conceivable to you that these sorts
9 concerns might have led banks to close Kaloti's
10 accounts?

11 A. Sorry, what particularly are you referring
12 to? These sorts of--

13 Q. We saw in R-260, the same concerns that were
14 listed in JPMorgan's SARS, so there was a concern that
15 Kaloti's account was being used a pass-through
16 account, that money was going to tax havens, and there
17 were other issues mentioned as well. So, the concerns
18 in that Article.

19 Is it conceivable to you that concerns such
20 as these would have led banks to close their accounts
21 with Kaloti?

22 A. It's really not--not my expertise to

1 determine--I do not deal with SARs, whether who
2 submits those and how often. So, it's not my
3 expertise, really--within my expertise to answer that
4 question.

5 Q. I struggle a little bit with this,
6 Mr. Smajlovic, so hopefully you can help me. So, you
7 say in your Reports, and we saw this extract earlier
8 that you've seen no evidence that the alternatives
9 causes put forth by Brattle caused Kaloti's loss, and
10 you accept that the issues in relation to potential
11 money-laundering and so on were one of the alternative
12 but--and you said you saw no evidence, but now you
13 seem to be saying something different which is that
14 these issues are beyond your expertise. Which is it?

15 MS. HORMAZABAL: Objection. He already
16 answered, and this question calls for speculation.

17 MR. SMYTH: With respect, Mr. President, he
18 did not answer that question. She has interrupted
19 before he could answer the question.

20 PRESIDENT McRAE: I think there is a
21 difference in what he said and what is in his Report.
22 I think it's legitimate to pursue that.

1 MS. HORMAZABAL: Understood, Mr. President.

2 PRESIDENT McRAE: I don't know how long,
3 he's asking the same question, though. So, I think
4 there is a limit on what you can do there.

5 BY MR. SMYTH:

6 Q. Would you like me to repeat the question?

7 A. Please.

8 Q. I will find--to update the Transcript. Bear
9 with me one second.

10 So, I struggle with this issue a little bit
11 because we saw in your Reports and the extracts that
12 we saw earlier that you say there was no evidence to
13 support the alternative causes put forward by Brattle,
14 and so money-laundering concerns and so on. Now you
15 seem to be saying something different, which is that
16 those issues are outside of your expertise. Which is
17 it?

18 A. I have not seen--the SARs you pointed out
19 was from 20--

20 Q. '13.

21 A. '13.

22 I have not seen any negative impact from the

1 SARs. In fact, if you look at the--starting in
2 February, I believe you said February 2013, the
3 revenues have skyrocketed starting from 2013, so I
4 have not seen any negative impact of that particular
5 SARs. I have only seen growth in sales revenue,
6 growth in volumes during 2013.

7 In terms of banking documentation that was
8 provided, it's correct. There is not a single
9 mention, Perú is the reason why we're shutting it
10 down. But there is at the same time not a single
11 mention that [REDACTED], relationship with [REDACTED] is the reason
12 why we're shutting it down.

13 So, what the ultimate reasons for the
14 closures are is for the Tribunal to decide, but I have
15 not seen personally any evidence that will make me
16 conclude that was the reason why it was shut down--it
17 was the relationship with [REDACTED], which is what Brattle
18 suggested in their Report.

19 Q. And equally, you see no indication in the
20 evidence you have seen that it was Measures taken Perú
21 that prompted the closures?

22 A. That's a fair statement because there is not

1 a mentioning of Perú or anybody else in that--in those
2 letters--closures.

3 Q. Thank you.

4 I would like to move on to a different topic
5 now, which is some of the relevant inputs in your
6 damages calculations and specifically your projections
7 in relation to gold volumes in the but-for scenario.

8 And when we refer to these volumes we are
9 talking about the amount of gold that KML sources to
10 then sell on to its customers; correct?

11 A. That's correct.

12 Q. And these volumes are a key driver to your
13 damages model because they form the basis of your
14 forecasted cash flows in the DCF, along with other
15 inputs, of course; is that fair?

16 A. That's a fair statement, yeah.

17 Q. So, just as a matter of pure arithmetic, the
18 higher the predicted volumes, the greater the
19 projected cash flows will be, all else being equal.

20 A. I agree with that statement.

21 Q. And the opposite is also true. So, if the
22 volumes of lower, the cash flow and therefore the

1 value of the Company will be lower, again all else
2 being equal.

3 A. That's a fair statement, yes.

4 Q. So, if we could turn to Figure 11 in your
5 First Report--and this is on PDF Page 47--so, this is
6 your projection of how KML's volumes sourced from Perú
7 would evolve, and I believe you forecast from
8 around--well, you have the figures for 2013, but then
9 your forecasting is from 2014 through to 2048. And
10 so, you predict that volumes will go from
11 14,000 kilograms in 2013 up to a peak of around
12 33,000 kilograms in 2016; that is correct?

13 A. That's correct.

14 Q. And the 14,000--to be clear, that is the
15 amount in 2013, whereas 33,000 is a projection;
16 correct?

17 A. That's correct.

18 Q. So, you project that, within two years,
19 volumes will more than double their highest level
20 prior to the Measures; is that correct?

21 A. That's correct.

22 Q. And that's despite the fact that, as we

1 discussed earlier, various major Suppliers linked to
2 the Chamy family disappeared in 2014; correct?

3 A. Yes.

4 Q. And if we go to Figure 12 on the next page,
5 this shows the projected Market Share versus actual
6 Market Share from 2013 to 2018, and your model shows
7 that from a Market Share of 9.25 percent in 2013,
8 KML's Market Share will increase nearly 6 percent in
9 2014 and a further 6 percent in 2015 to reach
10 21.2 percent. It's this projected increase in Market
11 Share that is the basis for the projected increase in
12 volumes from 14,000 kilograms in 2013 to
13 33,000 kilograms in 2016; correct?

14 A. That's correct.

15 Q. And then, following the increase in Market
16 Share to 21.2 percent, the volume assumes that such
17 Market Share will be maintained until 2048; correct?

18 A. That would not be exactly correct. If we're
19 speaking from a standpoint of Market Share. We're
20 speaking from a standpoint of the volumes I have
21 assumed, yes, that would be correct. Volumes which
22 existed as of 2018 and, as I mentioned in my

1 presentation, do not include new discoveries, anything
2 like that. From that standpoint, it's 21.25. That's
3 not to be confused with the Market Share in Perú of
4 21.25 percent.

5 Q. But to be clear, the Market Share that you
6 use is based on the production data that you referred
7 to. So, if we're looking at what is your projection
8 of the overall market in 2048, it's those production
9 volumes, and the percentage that Kaloti captures is
10 21.2 percent?

11 A. That's correct.

12 Q. Okay.

13 A. From the actual production, reported
14 production, which involved some estimates.

15 Q. And then, if you go to Paragraph 3.16 of
16 your First Report--it's Page 15 of the hard copy, but
17 the PDF number may be different--and it says: "I have
18 been asked to calculate damages to Claimant assuming
19 Claimant's Market Share in Perú (and other markets)
20 grew at the anticipated rate absent Respondent's
21 Measures, reaching a peak in 2016 with
22 32,512 kilograms of gold) 21.25 percent of the

1 Peruvian gold market)."

2 So, the projected purchase volumes in your
3 DCF model are based on an instruction; is that
4 correct?

5 A. That is not correct.

6 Q. No, it says here: "I have been asked to
7 calculate damages to Claimant, assuming Claimant's
8 Market Share in Perú (and other Measures) grew at the
9 anticipated rate absent Respondent's Measures."
10 That's not an instruction?

11 A. That's not instruction. The language--you
12 can interpret it in different way, but what that meant
13 is that I have taken into account 45,000 kilograms
14 demand letter that was given to--that was given by ██████████
15 to KML, and using that letter, I decided instead of
16 45,000 kilograms, I decided that 32.5 should be the
17 maximum that should be attributable to KML in 2016, at
18 which point, as you show in the graph, it declines
19 rapidly all the way through 2048.

20 Q. So, to be clear, your projections of
21 volumes, that's an independent assessment, is that
22 your testimony?

1 A. That is my independent assessment, yes.

2 Q. Okay. And in order to reach that
3 assessment, did you review any business plans of KML
4 to reflect that projected performance from 2014 to
5 2016?

6 A. The Business Plan--Business Plan did not
7 exist. The Business Plan was in the draft form, and
8 it was planned--planned to be submitted or to be
9 completed.

10 And when I asked about the Business Plan,
11 the 15 months of operation in Perú were not--what I
12 was told is that was insufficient for them yet to go
13 with the full-blown, they had the plans to go with
14 that taking into account 45,000 kilograms, but the
15 Business Plan did not exist.

16 Q. To your knowledge, do you refer to this
17 draft Business Plan in your Reports?

18 A. I do not because I never rely on it.

19 Q. Okay. But you reviewed it?

20 A. There is really not much to it, other than
21 the template that the Kaloti Metals & Logistics had in
22 order to forecast the volumes and forecast--there were

1 some studies of the market--I do recall that, studies
2 of the market--competitors and things of that nature,
3 but I have not seen any numbers per se. Generally
4 those are accompanied by the numbers but they have
5 never--allegedly never gotten to that point.

6 Q. Okay. We can take this in stages. So, that
7 document that you referred to, that did not form part
8 of the basis of your independent assessment of Market
9 Share; correct?

10 A. That's correct.

11 Q. And which document is it that you're
12 referring to? Do you recall if it has an Exhibit
13 Number in this Arbitration?

14 A. Sorry, which document?

15 Q. This draft Business Plan that you have been
16 discussing.

17 A. There is not a plan. There's other than--

18 Q. Well, you described it as a draft Business
19 Plan.

20 A. Yes, which had nothing in it.

21 Q. "Nothing in it."

22 A. Like I said, there's really no--other than

1 the study of the market. There's no numbers that I
2 can rely on.

3 Q. So, there's a draft Business Plan that has
4 no numbers that you could rely on to support your
5 independent assessment; correct?

6 A. That's correct.

7 Q. Just to clarify, is this Exhibit AK-002, if
8 we could bring that up, perhaps that could refresh
9 your recollection as to which exhibit this is.
10 AK-002.

11 So, we have AK-002. This is analysis of the
12 Peruvian gold industry.

13 If you could just scroll down a little bit.
14 Was this the document that you're referring
15 to?

16 A. You're going to have to scroll a little
17 more.

18 Q. Yeah, we can scroll a little more, of
19 course. And maybe just pause on the Table of Contents
20 because that will summarize the content.

21 A. That's not it because it says specifically
22 "Business Plan."

1 Q. Okay. Okay.

2 And where did you view that Business Plan?

3 Was that in Miami?

4 A. Yes.

5 Q. And was it a hard copy or was it digital?

6 A. It was a hard copy.

7 Q. So, you mentioned the letter from [REDACTED]

8 [REDACTED]. This is the letter in relation to the

9 45,000 kilos of gold; is that correct?

10 A. Yes.

11 Q. Okay. So, let's take a look at this letter.

12 It's Exhibit C-47. If we go down to the one and only

13 page.

14 So, in the penultimate paragraph there it

15 says: "We will channel the necessary resources to

16 support the exponential growth in quantities by

17 pledging the required resources technically and

18 financially to meet and satisfy your need to cater to

19 your client base in Perú so you can achieve the

20 forecasted target of 45 tons per year for coming two

21 to three years averaging three to 4 tons monthly."

22 This letter, it's not a contract, is it?

1 A. It's not a contract.

2 Q. No. It's not an Off-Take Agreement or a
3 Long-Term Supply Agreement.

4 A. No, it's not.

5 Q. Okay.

6 A. It is a letter indicating the demand for
7 certain volumes, which, by the way, continues to get
8 repeated throughout all the way through, I believe,
9 2017 or '16. The last thing I have seen, some of the
10 financing arrangements, which [REDACTED] continues to fund
11 the business, continues to ask for higher volumes from
12 Perú.

13 Q. And so this letter, does it contain any
14 terms in relation to price of the gold that would be
15 purchased by [REDACTED]?

16 A. No, it does not, but there is really no need
17 for that.

18 Q. Does it refer to delivery terms?

19 A. No, it does not.

20 Again, there is no need for it. I assume
21 that they use the same system that was the same supply
22 chain that existed, already existed, and it was very

1 effective, as I showed in my Report.

2 Q. And did you review any contracts between KML
3 and [REDACTED] laying out terms in relation to
4 issues such as price, volumes, duration?

5 A. I have not seen the Contracts per se. I did
6 see, like I say, on some of the documents, I have seen
7 the discounts they would offer to--or premiums, if you
8 will, on the other way, to Kaloti Metals & Logistics
9 should they exceed 2 tons, 3 tons per month and
10 volumes of that nature. I have seen that, but
11 particular contract, no.

12 Q. "No," okay.

13 And what about contracts with other
14 purchasers of gold?

15 A. I have seen some contracts in which, for
16 example, price-fixing takes place. I believe Mohamed
17 Resources is one of those that I have exhibited as
18 part of my Report, or maybe it was part of one of the
19 C Exhibits, I do not recall. But you could clearly
20 see that the Companies entering into certain
21 arrangements and for the delivery of gold at the
22 future point of time.

1 Q. So, you just remember that one Contract with
2 Mohamed Enterprise; is that right?

3 A. Yes. But there were many contracts that I
4 have seen of that nature, fixing, price-fixing and so
5 forth. And for the purpose of what I have done, I
6 have not relied on individual contracts per se
7 because, like I said, in each year, deliveries from
8 certain parties will change, and the only thing that I
9 have seen, the Contracts for the actual volumes that
10 they had on hand, so Mohamed Resources had certain
11 volumes which they transacted with Kaloti Metals &
12 Logistics, and they entered into a contract in which
13 they decided the terms for the delivery in the future,
14 future time.

15 Q. I just want to make sure we're not talking
16 across purposes here.

17 So, Mohamed Enterprises was one of the
18 Suppliers to KML. Here, I'm talking about a different
19 part of the supply chain, so this is purchasers who
20 would buy gold from KML. Does Mohamed Enterprise fit
21 into that category, or not?

22 A. No, it does not.

1 Q. Okay. And [REDACTED] was the biggest purchaser of
2 gold from KML; correct?

3 A. That's correct.

4 Q. And you've confirmed that you haven't seen a
5 contract with--between KML and [REDACTED] for the purchase of
6 gold; correct?

7 A. I have not seen it myself, but the way I was
8 explained, the way it was explained to me, there was
9 ongoing relationship in which the communication was
10 done daily or through messaging and those sorts for
11 the volumes they were transacting.

12 So, they would enter the actual--the actual
13 invoicing or transacting for the particular load, was
14 basically each day was what served as a contract, if
15 you will.

16 Q. Okay. And if we go back to this letter,
17 we've established there was no mention of the price
18 that [REDACTED] would pay for the gold, so is
19 there anything in this letter that would stop [REDACTED]
20 [REDACTED] demanding a very low price for the gold that
21 it was intending to purchase, pursuant to this letter?

22 A. I mean, if they demand the price below the

1 cost, you will not transact with them, but, yeah--no.

2 Q. But there is nothing to stop them from doing
3 that?

4 A. This is a letter, it's not a contract.

5 Q. Understood. So, if [REDACTED]
6 demanded that Kaloti provide gold to it for 1 dollar
7 per kilo, there is nothing in this letter to stop them
8 from doing that; correct?

9 A. No, but there is no incentive for them to
10 offer a dollar. Their incentive is, as a refinery, to
11 get as much as they can. And you can see throughout
12 that, even as they--like I said, as they continued to
13 finance the business, they keep stressing that the
14 volumes are insufficient. 2 tons for Kaloti--from
15 what I have seen at least, 2 tons a month for them are
16 insufficient. They're asking for even more.

17 So, you can see in my presentation one of
18 the slides, I've actually--I've listed how important
19 these higher volumes were worth to them, and what type
20 of discounts or premiums that Kaloti Metals &
21 Logistics would have received had they achieved higher
22 demand.

1 So, there's no incentive--I guess my point
2 is there was no incentive for them to offer because
3 you're not going to transact with them.

4 Q. They've got to get the gold from somewhere;
5 right?

6 So, hypothetically, if there was another
7 intermediary like KML who could provide the same
8 purchase volume at a lower price than KML was
9 offering, [REDACTED] could go with that intermediary;
10 correct?

11 A. I understand that the volumes that were
12 provided by KML are not even 10 percent of the total
13 volumes churned by [REDACTED]. So, [REDACTED] does have multiple,
14 multiple relationships. I have never valued [REDACTED], but
15 considering the amount that they supplied to them,
16 which was communicated to me by the
17 Claimants--Claimant, that's not feasible. What you're
18 suggesting is not feasible.

19 Q. But if they could get that same volume of
20 gold from a different Supplier at a lower price,
21 potentially they would do that; correct?

22 A. Everybody is in the business to pay less

1 than they can, yeah.

2 Q. Thank you.

3 And your damages model projects volumes up
4 to 2048; correct?

5 A. That's correct.

6 Q. And this letter here, this only relates to
7 the next two to three years, so that would take us up
8 to, say, 2015, 2016; correct?

9 A. With that letter, yes.

10 Q. And do you consider it important for KML to
11 have a committed Buyer in order to succeed?

12 A. Yes, very important.

13 Q. But even if we accept that this letter shows
14 [REDACTED] was a committed Buyer, it's only for
15 two to three years; correct?

16 A. Yes.

17 As of 2013, the letter was for two-three
18 years. I have actually made that inquiry.

19 Q. Okay.

20 A. And the way I was--the way it was explained
21 to me that the standard arrangements in case of gold
22 because, clearly, the shipments changed daily and

1 monthly. You don't go past three years. It just
2 doesn't make sense.

3 Q. But to be clear, you haven't seen evidence
4 that there was a committed Buyer beyond that two to
5 three years?

6 A. I have not.

7 Q. And if we look at Figure 15 on Page 46 of
8 your First Report--sorry--yeah, Figure 15, Page 46,
9 and if we could bring that up please. And we've
10 looked at this before, and we've seen that projected
11 volumes for 2016 were approximately 70,000 kilograms
12 for Perú and elsewhere.

13 This letter only suggests purchases--the
14 letter we were just looking at suggests purchases of
15 45,000 kilograms from Perú, so it would not cover all
16 of the projected volumes for 2016; correct?

17 A. That's correct.

18 Q. And the letter only talks about volumes from
19 Perú. So, even though you testified that one of the
20 most important factors in the business is to have a
21 committed Buyer, Kaloti didn't have a committed Buyer
22 for its volumes outside of Perú, did it?

1 A. I do not know that, whether they had a
2 committed Buyer other than [REDACTED]. I do see [REDACTED] as the
3 biggest purchaser, but I really cannot answer that
4 question.

5 Q. Okay. And the fact that KML may have had
6 demand from a particular customer for its gold, that
7 doesn't automatically mean that Kaloti would be able
8 to source the relevant gold; correct?

9 A. The risk of sourcing is always there.

10 Q. Right.

11 And you also refer at Paragraph 6.25 of your
12 First Report--if we could pull that up, please--to the
13 actual performance of KML, which you say makes--its
14 forecast of achieving 45,000 kilograms per year is
15 reasonably and well-grounded. And just want to drill
16 into that in a little bit more detail.

17 So, if you could pull up Exhibit C-43.

18 So, this is a summary of KML's transactions
19 from Perú broken down by month. And if we could go to
20 Page 1 of the PDF. Do you see it lists volumes month
21 by month?

22 Well, first of all, have you seen this

1 document before?

2 A. I have. I have seen this document.

3 Q. Okay. And based on this, you can see that
4 KML only started recording volumes in October 2012;
5 correct?

6 A. Based on that document, yes.

7 Q. And that's around a year before the relevant
8 Measures began?

9 A. Yes.

10 Q. So, your projections about future volumes
11 beyond the Measures, were based on just a single year
12 of business before the Measures; correct?

13 A. Based on 15 months of the actual experience
14 prior to the Measures, right.

15 Q. In fact--

16 A. I would say 15 months but November it was
17 impacted--

18 Q. Okay, 14 to 15 months, fine.

19 And looking at these documents and listed
20 purchase volumes for 2013, the highest figure recorded
21 is October 2013 for 2.8 kilos.

22 Can you zoom in a bit just so I can check I

1 got that right?

2 Ah, in fact, in pure quantity, it's 2.6, so
3 that's 2,600 kilos.

4 The figure for the next month is
5 1,600 kilos. And then there's a similar amount listed
6 for December, just slightly less than that November
7 volume.

8 So, what we see there is that from October
9 to November there is a drop of approximately 1,000
10 kilos; correct?

11 A. Yes.

12 Q. And that's before the relevant Measures;
13 correct?

14 A. Well, November was already impacted.

15 Q. But only at the very end of the month;
16 right?

17 A. Yes, but we don't know how many contracts
18 were canceled, how many of those deliveries were
19 scheduled for the later, at the end the month, so I
20 really cannot answer the question.

21 In other words, you could deliver in the
22 last five days lot more than what you have delivered

1 in the initial 20 days. It really depends on the
2 supply chain--

3 (Overlapping speakers.)

4 A. Can I please--

5 Q. Yes, you can.

6 A. Let me explain why.

7 In order to optimize the supply chain,
8 Kaloti wouldn't take the load and ship it immediately.
9 They were actually--they contracted with a vaulting
10 company and stored the goods and inventory in Perú
11 until it was economically for them to ship it, so you
12 wouldn't just simply take it and ship it immediately
13 as you receive something.

14 So, we really don't know how much of that
15 was sitting--goods were sitting and how much was
16 supposed to be sent at the end of the month, so it's
17 really difficult--based on these numbers, it's really
18 difficult to ascertain that.

19 Q. But you don't know whether there was that,
20 say, million grams sitting there at the end the month
21 that was due to be shipped at the end of the month but
22 wasn't because of the Measures? You don't know;

1 correct?

2 A. I do not know, but I do know that some of
3 the--some of the stuff--some of this stuff there was
4 actually already purchased is sitting, which is not
5 reflected over here. What you're showing is only what
6 was actually sold. This is incomplete.

7 Q. If we could focus on the--well, would you
8 scroll up to the top of this page.

9 This is all purchases. This is not talking
10 about sales; correct?

11 A. I believe this talks sales. It refers to,
12 as I understand, sales numbers.

13 Q. So, why does it say "Transaction Summary of
14 All Purchases"?

15 A. I don't know that, but I will tell you that
16 just looking at the number, that's how I judged it by,
17 14,000--at the bottom, if you scroll down to 2013,
18 14,10-800, that's actually sales. That tells me that
19 the gold that was actually purchased and hasn't been
20 shipped is not reported over here.

21 Q. And the shipment that was immobilized at the
22 end of--at the end of November 2013, do you know how

1 much that shipment, how much was in that shipment?

2 A. In grams, I believe--actually, you could
3 open my Report, there is a table, we can identify
4 which shipment it was. I don't recall.

5 Q. Would you accept that it's not a million
6 grams, it wouldn't reflect the entire amount of the
7 drop that's recorded from October to November?

8 A. The portion of the--just related to the Cs,
9 I don't know. No? We could open it up and see what
10 that is. But there's, like I said, there are other
11 things that could have been purchased but haven't been
12 shipped or could be in the transit that are not
13 reflected in the sales revenues.

14 Q. To be clear, have you analyzed the reasons
15 for that decline in volumes between October and
16 November?

17 A. The information that I have seen upon
18 interviewing the management of Kaloti Metals &
19 Logistics, the simple answer was this is just a part
20 of a business. You don't--you don't always just
21 increase, every month you get more and more. It
22 really depends--like you asked earlier, it really

1 depends on the supply side as well because sometimes
2 you will have a supply side bottlenecks that will
3 result in lower numbers.

4 It doesn't mean that you're not buying; that
5 you cannot transact. It just means at that particular
6 month you purchase less for whatever reason.

7 Q. Right.

8 So, that drop in purchase volumes, that
9 could have been because of a supply chain bottleneck;
10 correct?

11 A. That was not what I was told. I was told
12 that, generally speaking, towards the end of the year,
13 there is a tendency of those volumes to decrease, but
14 it's not necessarily happening every single year.

15 Q. Okay. So, there's a tendency of volumes to
16 decrease towards the end of each year?

17 A. Yeah.

18 Q. Okay. But, typically, you didn't--and other
19 than speaking with KML's management and establishing
20 that there was a tendency for a decrease at the end of
21 each year, you didn't investigate the causes of that
22 decline towards the end of the year; correct?

1 A. There were no--there is no information that
2 says--there is literally no information that you can
3 use that will say that--or that would indicate that
4 volumes decreased by, what did you say, a million
5 grams. The only thing that happened is that large
6 amount of gold that was already purchased is not
7 there. If you add that, that number will increase.

8 Large amount of shipments that were
9 purchased, or in the process of being purchased, they
10 were supposed to be sent to the U.S., had not been
11 sent. So, this information, like I said, I repeat
12 this, it's incomplete. So, there is no need to--if
13 you had the full information, then maybe you can try
14 to--to assess what happened, but I have not seen any
15 information that would indicate that other than the
16 Measures for seizure of the gold resulted in decline
17 in the volumes in November.

18 Q. But did you investigate whether the Measures
19 were the cause of that decline?

20 A. Yes, they were.

21 Q. They were? Even though the decline is from
22 October to November, which is largely before the

1 Measures?

2 A. I'm sorry, can you repeat that?

3 Q. So, you're saying you investigated whether
4 or not that drop from October to November was caused
5 by the Measures, and you're saying that, even though
6 it was before the Measures, it was somehow caused by
7 the Measures; is that correct?

8 A. It's not before the Measures. This is
9 entire month of November, which is missing a big chunk
10 of gold, that but for the Measures and shipping would
11 have been reflected here.

12 Q. That big chunk, you're referring to
13 Shipment 1?

14 A. Shipment 1.

15 Q. Yes.

16 A. Number 1.

17 Two, not Shipment 2, but Point No. 2, is
18 that there are some purchases that were made, they
19 were eventually in December reached the Miami
20 premises, that due to transit were not reflected here.

21 Q. Just a moment, Mr. Smajlovic.

22 (Pause.)

1 Q. We just think it would be helpful to pull up
2 the weight of Shipment 1, just to have a look at that.

3 So, if you look at Table 5 in your First
4 Report.

5 So, Purchase No. 1, we have the net weight
6 declared grams 100,000, and the decline that we just
7 saw was 1 million. So, this shipment, Purchase 1 that
8 was held up, that couldn't possibly account for the
9 entirety of that 1 million decline; correct?

10 A. That's just a part of it, yes.

11 Q. And just staying on the topic of events in
12 December 2013, or around the end of 2013, if we go to
13 Paragraph 6.146 of your Second Report--I believe it's
14 Page 111. 6.146, here you say: "KML's diminution of
15 value initially started in November 2013 followed by a
16 loss of four additional inventory purchases in January
17 2014, which occurred five years before [REDACTED]
18 was created."

19 And if you go over to the next paragraph, it
20 says that: "KML's loss of potential sales revenues
21 started in 2013 and was particularly observable
22 starting in 2014 onwards."

1 You stand by this testimony; correct?

2 A. I do, and if you switch back to--

3 Q. If we can just stick to the question for
4 now.

5 So, your view, then, is that KML's
6 diminution in value started with the Immobilizations
7 in late 2013, early 2014; correct?

8 A. Yes.

9 Q. Okay. I would like to talk now about your
10 projections regarding KML's Market Share from 2018 to
11 2048.

12 So, your model projects that KML would be
13 able to maintain a Market Share--and we've established
14 the entirety of the market is those projections of
15 Perú production that you rely on--would retain that
16 Market Share of 21.2 percent; is that right?

17 A. It requires clarification. As of 2018, I'm
18 sitting in 2018, and I need to forecast the but-for
19 values of KML. What I have done is I sit down and I
20 say what are the total reserves that exist as of 2018
21 in Perú. I got the total figures estimates which is
22 based on known and knowable reserves. Based on that,

1 I forecasted the production of that gold starting in
2 2019 all the way through 2048, totally depleting those
3 reserves by 2048.

4 In other words, what it was at the time,
5 that's all I have taken into account.

6 Based on the depleted volumes which gets you
7 to zero by 2048, I then estimate what portion of those
8 annual production will be attributable to KML.

9 Q. Okay. So, for KML to maintain that
10 21.2 percent or 21.25 Market Share, it would need to
11 not relinquish any of that Share to its competitors;
12 right?

13 A. That's correct.

14 Q. And did you review any documents indicating
15 what KML's strategy was for maintaining that Market
16 Share over the 30-year period?

17 A. I believe the relationship that they had
18 with [REDACTED] is the best evidence that I had of record.

19 Q. But you didn't review any documents
20 indicating what KML's strategy was for maintaining
21 purchase volumes in Perú over that period; correct?

22 A. Well, you have to keep in mind that, in

1 2018, there is no strategy. Business is going under,
2 the debt became due. They're barely surviving
3 throughout, and they were--depleted cash and the debt
4 became due. So, as of 2018, the last thing that was
5 on the plan of the Company from the communication that
6 I had with them was through forecast 2019 to 2048.
7 The goal was to sustained and stay in the business
8 throughout.

9 So, I have no information, if that's your
10 question--I have no but-for information for
11 contemporaneous forecasts or anything like that that
12 was done by the management.

13 Q. What about in the actual scenarios? If we
14 look before the relevant Measures, have you reviewed
15 any documents dating from that time that would
16 indicate what KML's strategy was for maintaining
17 Market Share?

18 To be clear, this is a narrow question: Did
19 you review documents?

20 A. There's no document. There are no documents
21 per se.

22 Q. "There are no documents." Okay. And would

1 you accept that the Peruvian gold market has low
2 barriers to entry?

3 A. It does not.

4 Q. "It does not have low barriers to entry."

5 A. I'm sorry, which market?

6 Q. So, the Peruvian gold market that KML was
7 operating in, does that have low barriers to entry?

8 A. Well, it depends how you defined "barriers
9 to entry."

10 Q. So, if we look at your Second Report
11 Annex 1, this is on Page 154, we're looking for
12 Paragraph 2.12. And, here you say: "While there are
13 many reasons for this occurrence, despite low barriers
14 to entry, existing firms that already have significant
15 economies of scale (which are perhaps mainly
16 exploited) would deter new entrants."

17 So, you have that Clause. I just want to
18 look at that one part of the sentence, "despite low
19 barriers to entry." So, you appeared--and correct me
20 if I'm wrong--to accept that the market has low
21 barriers to entry?

22 A. That would be mischaracterization of what I

1 have written in there.

2 Q. How else do we interpret "despite low
3 barriers to entry"?

4 A. Can I explain, please?

5 So, if you scroll up, you will see that this
6 is an annex that talks about hypotheticals. It
7 doesn't talk about Peruvian, KML or anything of that
8 sort. What he does, I'm talking about the competition
9 and what the importance of supply chains and how you
10 can create accreted value. And I say that that, even
11 in these situations, if they are despite, even if
12 there are low barriers to entry, I never say that
13 there is a low barriers to entry. Brattle has
14 misquoted me twice for this same thing.

15 If you scroll up, please, you will see that
16 that's what I'm talking about. I'm not talking about
17 Perú, or low barriers to entry in Perú. I did not
18 appreciate that comment.

19 Q. Do you think that the market KML was
20 operating in had high barriers to entry?

21 A. Barriers to entry, for sure. Every market
22 has barriers to entry.

1 Particularly, in case of this business,
2 anybody can come in. You can try to get in, if you
3 think that you know how you deal with the business,
4 but if you don't have the supply chain arranged, if
5 you don't have the financing that is needed, if you
6 don't have the customer that you're transacting, if
7 you don't have the banking relationship, it becomes
8 very difficult to do this, but anybody--sure,
9 anybody--that's why I say you have to define what you
10 mean by it. Anybody can start the business and try to
11 do that.

12 Q. And KML was able to disrupt the market and
13 enter it.

14 A. KML never--

15 Q. Among other things, by offering a higher
16 price to Suppliers than market incumbents; correct?

17 A. That is incorrect. KML never disrupted the
18 market. I've covered this extensively in my Second
19 Report, another complete misrepresentation by Brattle.
20 I believe they used a word that [REDACTED] has used.

21 And in my--also to clarify, in my
22 calculation, I have never seen an assessment, I have

1 never seen any market disruption.

2 In fact, Mr. [REDACTED] mentioned Metalor
3 as somebody that they disrupted, that they impacted,
4 and I presented, based on his Witness Statement, I
5 presented the financial metrics. Brattle was very
6 clear in pointing out that it was just an accounting
7 adjustment that caused it. There is no market
8 disruption. So, I'm not sure exactly what Mr. [REDACTED]
9 [REDACTED] referred to when he says it's a "market
10 disruption," but in the economic sense, it never
11 existed.

12 Q. Okay. Just for the record, we have
13 Paragraph 38 of [REDACTED] First Statements. He
14 talks about--

15 (Off microphone.)

16 Q. Could we get that up on the screen, please,
17 Paragraph 38 of [REDACTED] First Witness Statement.

18 So, he says: "Prior to KML entering the
19 Peruvian gold market, existing Buyers controlled such
20 market and dictated the price of gold; but I was
21 effectively able to disrupt their strategy."

22 You accept that [REDACTED] himself asserts

1 that he disrupted the market.

2 A. I'm sorry, is it a strategy or market? What
3 is it?

4 Q. Well, could it not be both, disrupt their
5 strategy. Is that the issue you have with Brattle's
6 Report, that they're not delineating between
7 disrupting strategy and disrupting market?

8 A. That is Brattle's interpretation. All I
9 know--and we went through this discussion--the
10 strategy was to pay certain percentages. When
11 [REDACTED] as I understand, came into the market, he
12 offered much higher fees, if you will, much higher
13 price for the gold, which disrupted the strategy of
14 the previous one. That doesn't mean that the market
15 was disrupted.

16 Q. Um-hmm.

17 A. But those are two completely different
18 things.

19 Q. Okay. I'm curious, you used the word "fees"
20 there.

21 A. That was incorrect.

22 Q. "That was incorrect."

1 A. It's the actual price that was paid.

2 Q. Thank you.

3 A. I apologize.

4 Q. And you mentioned that [REDACTED] was able
5 to offer a higher price than its competitors. Is it
6 fair to say that if KML's competitors started paying
7 more to KML's Suppliers for gold than KML was
8 offering, it could end up losing those Suppliers or
9 its margins could be squeezed. Would you agree with
10 that?

11 A. I would disagree with that.

12 Q. So, you think that if a Supplier came
13 along--sorry if a competitor to Kaloti came along and
14 offered to pay a higher price to one of Kaloti's
15 Suppliers for the same volume of gold, they would
16 stick with Kaloti, they wouldn't go with the higher
17 price?

18 A. Well, Brattle has made the statement. Had
19 they done a basic financial assessment--in fact, they
20 do, right below there. They say there was, I believe,
21 NTR Company or something like that, who offered
22 99.5 percent. And that company went bankrupt. They

1 could not sustain it. If you put 99.5 percent into
2 the model, you cannot even break even, so you're
3 losing money.

4 So, to make an allegation that somebody can
5 offer more, the margin is so thin that you are solely
6 dependent on these volumes. If somebody offers more,
7 and I believe Brattle suggested that if you just make
8 the change into my model, the business is loss-making.

9 So, it's just not possible. It's not
10 sustainable to offer more than what Kaloti Metals &
11 Logistics is talking about.

12 Q. We were talking about economies of scale
13 earlier, and I think it partly relates to that issue.
14 But if someone had sufficient economies of scale to
15 offer a higher price and take a lower margin, wouldn't
16 that end up with Kaloti either having to lose that
17 particular Supplier or squeeze its margin?

18 A. Based on the numbers that I have seen,
19 that's not possible. Hypothetical world? Everything
20 is possible. But, based on the factual numbers, that
21 is not possible.

22 Q. Even if they had economies of scale from

1 other jurisdictions.

2 A. When you say "economies of scale," I mean,
3 this is based on getting, as you mentioned, 60,
4 70,000 kilograms from all of the markets, and if you
5 add that, make the changes Brattle did, gets you to
6 negative numbers. So, I don't know what bigger number
7 or what competitor would have higher numbers than
8 those numbers that I've used.

9 Q. So, in other words, you're saying that
10 Kaloti had the thinnest possible margin that you could
11 achieve?

12 A. I'm not saying that. All I'm saying is that
13 the margins that they had were very sensitive to
14 volumes and to actually provide even higher incentive
15 would actually be--would be very difficult.

16 Q. And do you know why NTR went bankrupt?

17 A. I do not know.

18 Q. Okay.

19 PRESIDENT McRAE: Mr. Smyth, could I ask a
20 question about timing?

21 MR. SMYTH: Of course you can.

22 PRESIDENT McRAE: We're a little over what

1 the Schedule was, but I know you don't have to stick
2 to that, but just to get a sense of where we're going.

3 MR. SMYTH: So, I would say I'm probably
4 three quarters of the way through. I would not--it
5 depends on what time we take lunch. If the plan is to
6 take lunch at 1:00 p.m., it's possible I will finish
7 by then. If it's earlier than that, probably it's not
8 going to be achievable.

9 MR. DÍAZ-CANDIA: Mr. President, no
10 objection whatsoever, but that may take us into
11 Saturday with Brattle.

12 PRESIDENT McRAE: So, you would try to
13 finish by 1:00. That's possible, you say?

14 MR. SMYTH: I think it's possible, but
15 obviously it depends on the answers in the
16 cross-examination.

17 PRESIDENT McRAE: Of course. Then we were
18 originally going to break at 12:40 I think or 12:55.
19 Do you want to take a five minute break and we'll
20 continue to 1:00?

21 REALTIME STENOGRAPHER: Yes.

22 PRESIDENT McRAE: So, let's take a five

1 minute break and then we'll schedule lunch for 1:00
2 and see how we go.

3 MR. SMYTH: Thank you.

4 PRESIDENT McRAE: Thank you.

5 (Brief recess.)

6 PRESIDENT McRAE: If you're ready,
7 Mr. Smyth, but I understand if you want to wait for
8 Mr. Grané.

9 MR. SMYTH: Yes. Our team is not quite
10 complete. So, maybe we could give him another
11 30 seconds, and if not, we can resume.

12 (Pause.)

13 MR. SMYTH: I think we will make a start,
14 Mr. President, in the interest of time.

15 PRESIDENT McRAE: Go ahead.

16 MR. SMYTH: I'm going to try and speak a
17 little more slowly for the benefit of the Interpreters
18 and Court Reporters.

19 BY MR. SMYTH:

20 Q. I would like to look briefly now at your
21 projections of purchase volumes from outside of Perú.

22 Now, in order to project those volumes, you

1 took the ratio between gold sourced from Perú and
2 outside of Perú in 2013, and assumed that the same
3 ratio would apply throughout the period for which you
4 modeled damages; correct?

5 A. That's correct.

6 Q. And you explained that at Paragraph 6.34 of
7 your First Report, that the ratio of Perú versus
8 non-Perú volumes in 2013 was 47 to 53. We can go to
9 the paragraph if you like, but I will just put it to
10 you, this means that 53 percent of your projected
11 volumes are from outside of Perú; correct?

12 A. Sorry, if we're talking damages on a
13 hundred-percent basis, that is correct, yes.

14 Q. At the moment I'm talking about volumes, so
15 53 percent of your projected volumes are from outside
16 Perú?

17 A. Correct.

18 Q. And such volumes account for more than half
19 of your damages prior to Pre-Award Interest? This is
20 leaving aside the injury claim.

21 A. That's correct.

22 Q. And so, would you agree that by holding the

1 Perú-non-Perú volume ratio fixed, you assume the same
2 132 percent growth from 2013 to 2016 for non-Perú
3 volumes that you assumed for Perú volumes?

4 A. I agree with that, just it requires some
5 explanation.

6 While I'm maintaining the growth, I'm
7 maintaining the decline because I'm linking the
8 decline from Perú based on known and knowable reserves
9 and maintain the ratio in an effectively declining
10 other market volumes as well.

11 Q. You heard, Mr. Smajlovic, which everyone is
12 eager to wrap up before lunch. So, if you could keep
13 your answers short, that would be appreciated and
14 stick to the precise question asked.

15 Obviously, my colleagues over the aisle can
16 ask you to expand on anything, should they see fit.

17 So, unlike your forecasted volume growth for
18 Perú, you were not given an instruction about--let me
19 rephrase.

20 You were not given an instruction about
21 volume or share growth outside of Perú; correct?

22 A. I was never given instruction on the share

1 growth. I was always given instructions on the
2 document to rely upon to forecast the volumes.

3 Q. So, you were not given an instruction in
4 relation to the volumes to be forecast from outside
5 Perú; correct?

6 A. That's correct.

7 Q. So, they're your independent projections;
8 correct?

9 A. That's correct.

10 Q. In order to compile those projections, did
11 you review any Business Plans for KML's business
12 outside of Perú?

13 A. I mentioned that Business Plan was
14 non-existent.

15 Q. Any contracts with Suppliers from outside of
16 Perú?

17 A. I have seen the Contracts--sorry, I have
18 seen the settlements which predicate that there were
19 some type of precious metal purchase and sales, but
20 the Contracts themselves, I've never gotten to that
21 granular level.

22 Q. And did you, in your Reports, analyze any of

1 the markets from which Perú--from which KML would
2 source its gold outside of Perú?

3 A. I have not.

4 Q. And you have not analyzed how much of those
5 markets would actually be available to KML; correct?

6 A. Well, the, as you mentioned, 53 percent of
7 the total volumes come from 18 countries, whereas
8 47 percent comes from a single country. So, 18
9 countries certainly had a lot more volumes than what I
10 forecasted as part of KML's purchases.

11 Q. But to be clear, you haven't analyzed the
12 markets in any of those 18 countries; correct?

13 A. I have--I have looked into the reserves and
14 volumes that they had, but I've never "analyzed," as
15 you say, to the level of each individual Supplier from
16 each country. I have not done that.

17 Q. Right.

18 And you don't say which countries the growth
19 in volume from outside Perú would come from, do you?

20 A. I have provided a list of countries as part
21 of my AS-68, I believe, it was Exhibit 3.9.2, that
22 shows the list of all the countries from which the

1 but-for volumes would have come.

2 Q. Could we pull that up, please. 3.9.2 of
3 Exhibit AS-68.

4 So, first of all, where did the information
5 in this table come from?

6 A. These--I believe these were actual purchases
7 by KML from each country between 2012 to 2017.

8 Q. And where did that information come from?

9 A. It came from the financial system--can you
10 please show me 2013 numbers? Remember the 14,011 or
11 29,941? There you go. It ties--those numbers tied to
12 the actual volumes purchased by--in the actual world,
13 purchased by KML, so those are the purchases broken
14 down for each jurisdiction or country in which they
15 are buying gold.

16 Q. I think that the answer to my question was
17 contained in the first part of that. You say this
18 information came from the financial system. But what
19 financial system is that?

20 A. I forgot the name of it. I believe it's
21 tied to NEO, which is the trading platform that they
22 used, but it's NEO/Financial Statements that come out

1 of that--I believe it's called "NEO."

2 Q. Called "NEO," and that's accessible from
3 Miami; correct?

4 A. Yes.

5 Q. And it contains information in digital form?

6 A. Yes.

7 Q. Do you--if you can't remember, that's okay,
8 but what sort of information is available on that
9 system?

10 A. You can see the Transactions they were
11 entered into with, if I recall correctly, I have seen
12 200 plus different Parties that they were engaging
13 over the course of the years.

14 You can see whether the position that--the
15 actual price that was paid, the quantity of volumes,
16 whether something was actually delivered or to be
17 delivered, whether the price was settled on the date
18 of the Transaction or whether it was what's called
19 "open," which means that the Seller or producer of the
20 gold decided not to sell on that particular date but
21 decided to wait and settle the price in the week or
22 two or whatever they decided. Those type of things

1 you actually are able to see.

2 It's a very sophisticated software that was,
3 I believe, designed in India.

4 Q. "In India"?

5 A. Yes.

6 Q. Okay. Thank you.

7 So, looking at this tab again, you have
8 figures for various different countries, I believe you
9 said 18 different countries, and you have the volumes
10 there. That's volumes in the actual world; correct?

11 A. That's correct.

12 Q. Yeah.

13 So, it doesn't contain any projection of
14 volumes in the but-for world.

15 A. It does not.

16 Q. He does not?

17 A. He does not--it does not.

18 Q. Oh, "it does not."

19 A. These are the actual purchases from 18, I
20 believe, countries.

21 Q. Yes.

22 A. I say "18." It had "other" which includes

1 some other countries but they're not--volumes were
2 not, I believe, as significant.

3 Q. To be clear, your projections don't
4 delineate where particular volumes will be sourced
5 from in the future; correct?

6 A. It's from an individual country's
7 standpoint, they do not.

8 Q. Thank you.

9 We can move on to a different topic now,
10 possibly the final topic, which is KML's barrier of
11 entry, so what we've been referring to is the Five
12 Shipments.

13 You said during your presentation that you
14 had been instructed to assume that KML was a bona fide
15 Purchaser and had valid ownership of the Five
16 Shipments; is that correct?

17 A. That's correct.

18 Q. So, if KML was not a bona fide purchaser or
19 did not have legal ownership of the shipments, what
20 impact would that have on damages?

21 A. That is a legal issue, but if the Tribunal
22 decides that that number needs to be removed, it would

1 have an impact of value of the inventory, I guess,
2 would in that case would be zero.

3 Q. Okay. Thank you.

4 And you haven't carried out any analysis of
5 your own to determine whether KML did have legal
6 ownership of that inventory; correct?

7 A. That's correct. That's outside of my
8 expertise.

9 Q. And then, if we could pull up Paragraph 5.82
10 of your Second Report--we have it there--it says: "As
11 part of my First Report, I provided documentary
12 evidence (KML's financial statements) which shows that
13 KML has legal ownership of the seized gold."

14 So, here you're saying that KML did have
15 legal ownership of the gold?

16 A. What I said that the Financial Statements
17 reflect the view that they that had legal ownership of
18 the gold.

19 Q. That's not quite the wording you use here.
20 You said it "shows that KML has legal ownership of the
21 seized gold." Are you saying that that should be
22 amended to say "reflects" rather than "shows"?

1 A. You can say that, but generally you cannot
2 book, from an accounting standpoint, you cannot
3 recognize something on your balance sheet unless you
4 actually--unless you possess the ownership, regardless
5 of whether you pay for it or not.

6 Q. Okay. And if we could pull up one of those
7 balance sheets, which you helpfully confirmed were
8 unaudited and saved me a question or two, AS-66, this
9 is the 2018 balance sheet.

10 So, it's unaudited, but you understand this
11 balance sheet to be correct? You understand that's
12 correct?

13 A. Yes, I've actually, as part of my analysis,
14 I went through the balance sheet and Income Statement
15 and analyzed for the--for the accuracy.

16 Q. Yeah.

17 A. So, I do--I do--I will represent to you that
18 I believe that these are accurate numbers.

19 Q. Understood.

20 And if we see towards the top under "current
21 asset," there is an entry for inventories, and there
22 is a figure of \$12.698 million.

1 Do you see that?

2 A. I do.

3 Q. That's the inventory figure in the 2018
4 Balance Sheet; correct?

5 A. Yes.

6 As of--it says December 31, 2018.

7 Q. Yes, yes. And do you accept that this
8 figure does not include the value of Shipments 3 and
9 5; correct?

10 A. That's correct. Only three shipments are
11 reflected there.

12 Q. And the fact that shipments are not included
13 in inventory, does this make it questionable whether
14 or not KML owned them?

15 A. It would not.

16 Q. Did doesn't make it questionable?

17 A. It does not.

18 Q. Okay. So, if we could go to Paragraph 5.82
19 of your Second Report.

20 A. And I can explain, if you--

21 Q. I will show you the Paragraph first, and
22 then perhaps you can explain.

1 So, this is the same paragraph we were
2 looking at before, and it's the second sentence.

3 So: "If the legal ownership of these
4 inventory volumes is indeed questionable, the
5 associated inventory would not be reported on KML's
6 current asset account."

7 So, having accepted that the 2018 Balance
8 Sheet does not include Shipments 3 and 5, does that
9 not mean that the ownership is questionable?

10 A. That's not--the way I see it, it's not that
11 the ownership is questionable. It's the actual--the
12 issue of whether to record and maintain those numbers
13 on the Financial Statements or not. That's a separate
14 issue. But that doesn't mean that--just because that
15 inventory is actually not there, it doesn't mean that
16 the legal ownership of that gold is not--does not
17 belong to KML.

18 And again, I'm not providing--I'm not
19 providing a legal opinion of that. All I'm
20 saying--that me personally as a CPA, if you ask me to
21 go back, and say "how would you treat this?" I would
22 have treated that differently.

1 Q. Okay. And would you accept that a possible
2 reason why it was not included in the inventory is
3 because KML didn't consider it had legal ownership?

4 A. That's not the reason I was provided.
5 Under--the answer that I was given that--at the time
6 their accountant just simply realized that the gold is
7 taken, it's not there. And for those particular two
8 shipments, they haven't made the payment, so they just
9 followed the cash accounting, and they removed those
10 two shipments.

11 Q. So, you accept that those two shipments, 3
12 and 5, were never paid for by KML.

13 A. I do.

14 Q. Yeah. And--

15 A. I believe that initially, as you will see in
16 the Financial Statements, they were reported. The
17 associated liability was recorded. But for whatever
18 reason they decided to remove that in the subsequent
19 year.

20 Q. Okay. And it's management who has
21 responsibility for making those sorts of decisions;
22 correct?

1 A. I would say management, yes and--you know,
2 an accountant who actually is in charge of that.

3 Q. Yes, but the ultimate responsibility would
4 be with management. Would you agree with that?

5 A. I would agree with that. Yes.

6 Q. And you state in your First Report, and this
7 is at Footnote 9 on PDF Page 15. You say: "Note that
8 in case of an award, Claimant will have to compensate
9 its Suppliers for two additional loads of inventory
10 which to date are not paid. As such, total proceeds
11 to the Claimant will be decreased after paying for
12 this liability."

13 Here, you're referring to Shipments 3 and 5;
14 correct?

15 A. I believe so.

16 Q. You're not sure?

17 A. Can you take me to the actual statement so I
18 can see what the footnote is, and I would be able to
19 tell you.

20 Q. Of course.

21 A. Sorry, what was the Footnote No.?

22 Q. 9.

1 A. Yeah.

2 Q. Okay. And you referred to, if we go back to
3 Footnote 9, you referred to a liability here with
4 respect to the shipments. And if we could go back to
5 the 2018 Balance Sheet, that's AS-66. And then, if we
6 go down to "Accounts Payable," which is under heading
7 5, there is no liability recorded here for [REDACTED]
8 or [REDACTED], the two companies with those names, [REDACTED]
9 [REDACTED] and [REDACTED]?

10 A. That's correct.

11 Q. And are you aware that those are the
12 Suppliers of Shipments 3 and 5?

13 A. That sounds like--correct, yeah.

14 Q. So, this balance sheet provides no basis for
15 saying that those shipments would have to be paid for
16 as of any Award; correct?

17 A. That's correct.

18 And I mentioned that the--previously, that
19 the Transaction was reversed out in the following
20 year, so yes, there is no liability, there is no
21 inventory on the books of Kaloti Metals & Logistics
22 associated with Shipment No. 3 and Shipment No. 5.

1 Q. Thank you very much. I have no further
2 questions.

3 PRESIDENT McRAE: Claimant, do you have some
4 redirect?

5 MS. HORMAZABAL: I do. I have quite a few.
6 Would you like to take lunch by any chance?

7 PRESIDENT McRAE: Well--

8 MS. HORMAZABAL: If you want me to continue,
9 I will.

10 PRESIDENT McRAE: My preference would be not
11 to hold the Witness Expert in isolation during lunch.
12 So, if you could--if you are planning to finish around
13 1:00 or shortly after.

14 MS. HORMAZABAL: Sure, yes.

15 PRESIDENT McRAE: Proceed.

16 Is that acceptable?

17 MR. SMYTH: That's certainly acceptable to
18 us. Yes.

19 MS. HORMAZABAL: Not a problem.

20 REDIRECT EXAMINATION

21 BY MS. HORMAZABAL:

22 Q. Mr. Smajlovic, you have confirmed that these

1 Financial Statements are now unaudited. Does this
2 change in any way your analysis of any of the numbers
3 or Financial Statements?

4 A. No, it does not.

5 Q (By Secretary Kettlewell)

6 SECRETARY KETTLEWELL: Can you speak closer
7 to the microphone?

8 THE WITNESS: No, it does not.

9 BY MS. HORMAZABAL:

10 Q. Did you review and take into account the
11 Witness Statements in this case concerning termination
12 of Supplier relationships and/or banking
13 relationships?

14 A. Yes. I believe Mr. [REDACTED] goes into quite
15 detail about or recalls some of the examples of
16 cancellations of the Contracts.

17 Q. You said that a number of transactions were
18 made after the Immobilizations. Do you know if that
19 was after Immobilizations were actually made public?

20 A. I'm sorry, can you repeat the question?

21 Q. You had previously said that a number of
22 transactions were made after the Immobilizations. Do

1 you know if that was after the Immobilizations were
2 actually made public?

3 A. Well, I believe the documents that I was
4 shown, where it lists all of the volumes that were
5 purchased up to January of 2014, you can still see a
6 significant purchases and precipitous decline
7 following February.

8 So, with the seizure of the gold and we have
9 seen, based on the records, a decline in the gold
10 purchases.

11 Q. So, the effect wasn't necessarily the
12 Measures but also the publicity of the Measures?

13 A. I really cannot--I really cannot opine on
14 that.

15 Q. Okay. I would like to pull up one of the
16 articles that Respondent's counsel had projected,
17 R-0251.

18 (Pause.)

19 Q. I will move on.

20 The fact that the Measures affected KML from
21 gaining new Market Share due to the detrimental
22 articles against KML has also been taken into

1 consideration in your calculation of damages?

2 MR. SMYTH: Apologies, I believe that is a
3 leading question.

4 MS. HORMAZABAL: I will rephrase.

5 PRESIDENT McRAE: I'm not sure. If you can
6 ask whether something is taken into account, you may
7 want to rephrase it.

8 MS. HORMAZABAL: That's not a problem.

9 BY MS. HORMAZABAL:

10 Q. Did you also take into consideration the
11 detrimental articles against KML in your calculations?

12 A. Yes, I have.

13 Q. Could you please show BR-0011.

14 Do you know if the full name of Kaloti
15 Metals & Logistics was mentioned in this article that
16 Respondent's counsel has shown?

17 A. As part of my review, I have not been able
18 to identify that, so my recollection is there was
19 never mentioning of Kaloti Metals & Logistics.

20 MS. HORMAZABAL: If the Tribunal will permit
21 me, if I can run a "control find" to see if the name
22 is mentioned? Or I can move on.

1 MR. SMYTH: No objection.

2 PRESIDENT McRAE: I don't see any problem
3 with that, if you want to do that.

4 MS. HORMAZABAL: I will go ahead and move
5 on.

6 BY MS. HORMAZABAL:

7 Q. Okay. Going back to R-0251.

8 Mr. Smajlovic, could you please read the
9 dates that Perú's counsel had previously shown.

10 A. If you're asking about Table 4, it refers to
11 "Export Frequency During 2007-2013."

12 Q. Okay. So, this article relates to the
13 period from 2007 to 2013, and the Measures occurred at
14 the end of 2013, beginning of '14.

15 PRESIDENT McRAE: Was that a question or a
16 comment to the Tribunal?

17 MS. HORMAZABAL: That was a comment to the
18 Tribunal.

19 PRESIDENT McRAE: Maybe you should just ask
20 questions.

21 MS. HORMAZABAL: Okay.

22 BY MS. HORMAZABAL:

1 Q. Respondent's counsel presented the one
2 article about [REDACTED] that was
3 published in 2014. Do you remember if that became--if
4 that situation became public prior to 2013?

5 A. Sorry, can you repeat that again?

6 Q. Respondent's counsel has previously
7 presented one article regarding [REDACTED]
8 [REDACTED] that was published in 2014. Do you
9 remember if that became public, that situation became
10 public, prior to 2013?

11 A. I do not know. I would presume that if the
12 findings were from 2012, that those findings from 2012
13 were probably available, but I really cannot answer
14 that question.

15 Q. Would you have seen such effects prior to
16 the Measures, prior to the dates of the Measures?

17 A. As I indicated in my testimony, as Brattle
18 has provided that and alluded there could be some
19 relationship with [REDACTED] that deteriorated business, and
20 they cited that particular document. And if that was
21 truly the case, there should have been a direct
22 correlation between the bad acts, if you will, and the

1 purchases of the gold. That was clearly--connection
2 was not there.

3 Q. Respondent's counsel stopped you when you
4 were going to discuss something about KML's Supplier.
5 It appears to be Mohamed. Would you like to expand on
6 this? If it is not relevant or important, please
7 advise.

8 A. Well, just a small remark, as I was looking,
9 as part of my preparation to do the forecast, but-for
10 forecast, and after receiving the information of
11 monthly or annual purchases of volumes, we have
12 noticed during the course of our work that certain
13 Suppliers, indeed, did not provide lower volumes.
14 Generally, that's what basically happened, and Mohamed
15 Resources was one of those that actually continued to
16 provide significant number.

17 And I felt compelled to inquire when I was
18 in Miami, and the answer that I was given is that
19 Mohamed Resources was a type of--they referred to
20 those as "customers," but it was a Supplier--that
21 didn't believe in allegations in Perú, didn't believe
22 that the gold that was seized was of illicit nature.

1 So, that particular company just disregarded it and
2 continued to deal with it--deal with KML, which
3 explains why over the time actually volumes had been
4 increasing from Mohamed Resources.

5 Q. It is possible that a handful or a sample of
6 companies such as the ones that Respondent's counsel
7 has presented, may have not read the articles or may
8 have not ceased operations?

9 MR. SMYTH: Again, that's undoubtedly a
10 leading question.

11 PRESIDENT McRAE: It's speculative, I know,
12 but is there a problem other than being speculative?

13 MR. SMYTH: Well, it's a question that
14 suggests the answer, and in our submission that would
15 be a leading question.

16 MS. HORMAZABAL: This is a redirect.

17 MR. SMYTH: Exactly.

18 MS. HORMAZABAL: I'm going to go ahead to
19 the next one.

20 BY MS. HORMAZABAL:

21 Q. Is it your testimony that what is relevant
22 is damages are not individual Suppliers but the total

1 output of gold in Perú?

2 A. That's correct.

3 Understanding, if you understand the actual
4 underlying driving force of the business, you will
5 realize that the individual contracts are not
6 something that is always of the repetitive nature,
7 other than--other than--if you engage in their large
8 Suppliers.

9 Q. Do you know if SARs, Suspicious Activity
10 Reports, are public documents?

11 A. I believe they're not.

12 Q. Okay. We're going to go ahead and pull up
13 the Transcript for Day 2 of this Arbitration,
14 Page 529, 530. And if you could please read what the
15 answer was here from [REDACTED] Line 4, please.

16 A. "--with the Suppliers. And we decide--we
17 decide to close the bank account for JPMorgan."

18 Effectively, [REDACTED] here has confirmed
19 that what was communicated to me while I was in
20 Dubai--I mean, sorry, when I was in Miami.

21 Q. If you could scroll further down.

22 There is an established business

1 relationship with [REDACTED]; is
2 that correct?

3 A. That is my understanding.

4 Q. Do business relationships also require
5 trust?

6 A. I would assume so.

7 Q. KML had to assay and do certain procedures
8 to the gold prior to sending it to [REDACTED] y
9 [REDACTED]; correct?

10 MR. SMYTH: Objection, again, I believe that
11 is a leading question.

12 BY MS. HORMAZABAL:

13 Q. KML had to--there were certain procedures
14 that may have been done by KML prior to sending it to
15 [REDACTED] to the best of your
16 knowledge?

17 A. Yes.

18 Q. So, my question is: Respondent's counsel
19 had asked you to infer, speculate if [REDACTED]
20 [REDACTED] could have purchased from another
21 Supplier at a lower amount. Wouldn't the
22 consideration of the established business relationship

1 and the fact that KML owed money to [REDACTED] were actually
2 practical incentives for [REDACTED] to deal with KML and the
3 trust to be taken into account?

4 MR. SMYTH: I think that's a leading
5 question, again. We may differ with Claimant's
6 counsel on what is or is not a leading question, but
7 in our view that is a leading question.

8 MS. HORMAZABAL: I can rephrase.

9 PRESIDENT McRAE: I find that a complicated
10 question, and maybe you can make it simpler which
11 wouldn't be leading.

12 MS. HORMAZABAL: I will make it simpler.

13 BY MS. HORMAZABAL:

14 Q. Respondent's counsel had asked you to infer,
15 speculate, if KML could have purchased from another
16 Supplier at a lower amount; is that correct?

17 A. I do recall him asking that question, and I
18 believe I provided the answer to that. That paying
19 more than what Kaloti was paying was not feasible
20 economically.

21 Q. Do you believe that [REDACTED] had actual practical
22 incentives to deal with KML?

1 A. I do. Specifically, like I said, [REDACTED] is in
2 the business of getting a lot more gold, and they have
3 an incentive to get more gold.

4 Number 1 And Number 2, I believe [REDACTED]--not
5 "believe," we know that [REDACTED] provided a significant
6 amount of capital which I believe it's on my
7 presentation in which, Revolving Credit Facility and
8 those type of things that gets you to \$15 million.
9 So, there definitely was incentive to maintain the
10 relationship.

11 Q. Could we please show AS-0050.

12 Respondent's counsel had previously asked
13 you whether the demand letter from [REDACTED]
14 only encompassed three years; is that correct?

15 A. That's correct.

16 Q. Does this document, AS-0050, show that there
17 may have been--does it suggest that, as of March 2016,
18 they were incentivizing KML to purchase even greater
19 than three tons a month?

20 A. Yes.

21 And I believe I mentioned that, even under
22 the Measures between 2013-2018, the pressure was

1 always there from the [REDACTED] to get more volumes. The
2 way I'm reading this, they are providing them
3 significant incentives, and you can see this in the
4 column, second column, where the charges for the
5 financing charges will be lowered should KML provide
6 additional--additional volumes.

7 Also the refining charges would actually
8 decrease that [REDACTED] was charging KML should they produce
9 higher volumes, and they would provide some additional
10 discounts. So, I see this as a continuation of their
11 willingness to work with them and get to the
12 quantities that they agreed to.

13 Q. Thank you.

14 Going to the question on whether the last
15 few months of 2013 of KML experienced a decline. To
16 the best of your knowledge, do you know if Perú, a
17 Latin American country, had their holiday or summer
18 vacation periods during the end of the year?

19 A. Yes. I mean, Christmas--Christmas, as I was
20 told, Christmas is a big holiday in South America.

21 Q. Thank you.

22 Please show, 6.147 of Mr. Smajlovic's Second

1 Report.

2 A. If I may just add, when I mentioned
3 Christmas, as we were looking at the monthly
4 purchases, I was inquiring and often the way I was
5 told that around mid-December pretty much the
6 deliveries shut down from the region because very
7 family-oriented region, and people have a tendency to
8 take some time off towards the end of the year.

9 Q. Mr. Smajlovic, I'm showing you here 6.147 of
10 your Second Report. Respondent's counsel had
11 previously touched upon this sentence, and you were
12 cut short. Could you please expand, or would you like
13 to clarify anything?

14 A. The 6.147 refers to the effects of the loss
15 of the customer base, which was by, I believe,
16 November, November 14th--culminated by November 14 of
17 2018, of the creditor requesting immediate payment for
18 the debt.

19 MR. SMYTH: Excuse me, this was not the
20 subject of my cross. So, it falls outside the scope
21 of redirect.

22 PRESIDENT McRAE: Can you ask him a specific

1 question about 147 instead of letting him just talk
2 about it?

3 MS. HORMAZABAL: Sure.

4 BY MS. HORMAZABAL

5 Q. Respondent's counsel is asking about KML's
6 loss of potential sales revenues, started in 2013 and
7 was particularly observable starting in 2014 onward
8 discussing the loss of customer base. Would you like
9 to expand on this?

10 A. I believe I stated enough.

11 Q. Okay, thank you.

12 Please go to 2.11 of the same report and
13 2.12.

14 When Respondent's counsel asked you a
15 question about this part of the document, he did not
16 show you the prior page when you had asked. Would you
17 like to see the prior page and further clarify? Well,
18 this is the prior page.

19 A. I believe I don't need to, but I believe I
20 clarified that the discussion that was listed in this
21 particular annex is all hypothetical. I was not
22 referring to particular--I did not cite, if you scroll

1 down, I believe the language was that I admitted that
2 there are low barriers to entry. They just completely
3 misrepresented my statement. And what I stated is
4 that, if you read the full context, you will see that
5 that's not the statement I made.

6 Q. Thank you.

7 Could you please expand on the comment
8 Perú's counsel made about your calculations regarding
9 the volumes outside of Perú?

10 MR. SMYTH: That seems like a very
11 open-ended question. I mean, there were a few
12 questions about that issue. I think it would help
13 certainly if Claimant's counsel could be more precise.

14 MS. HORMAZABAL: It's not leading.

15 MR. SMYTH: That wasn't the nature of the
16 comment. It's more that it was just so open-ended
17 that it's not possible to tell whether it falls within
18 the scope of my cross.

19 MS. HORMAZABAL: Typically, in redirect, I
20 can leave open-ended questions.

21 PRESIDENT McRAE: I'm not clear what the
22 question is. You want him to comment on what Perú's

1 counsel said?

2 MS. HORMAZABAL: Perú's counsel had made
3 certain assertions about the volume--about the nature
4 of the calculation of the volumes outside of Perú.
5 I'm asking Mr. Smajlovic to have an opportunity to
6 expand, if he wishes.

7 PRESIDENT McRAE: Yeah, go ahead.

8 THE WITNESS: Thank you for the question.

9 I believe as we were sitting, and we are
10 tasked to calculate the but-for value, but-for
11 volumes, which leads you to the cash flows, we started
12 with Peruvian market. The information was there. But
13 then we are dealing with 18 plus other countries. And
14 the option was go into granularity and up--and
15 estimate what those volumes are going to be or at
16 which point of time, regardless of the numbers you put
17 in, you will be considered subjected. Brattle, the
18 Expert hired by Respondent, have used lots of ratios
19 from 2013, and we did the same thing. Instead of
20 forecasting the volumes from 18 other countries at the
21 different pace, we just kept a ratio. And yes, sure
22 enough, we grew the market, grew the volumes by two

1 years and then we started declining for 30 plus years,
2 30 something years.

3 So, I consider that approach to be
4 conservative because--and if you look at the volumes,
5 the volumes that we get to on an annual basis, and the
6 cash flows, you remember the \$6 million that I
7 mentioned in but-for world that were made? Starting
8 with that in the actual world, 3 million, 3.7 million
9 or 3.4 million between 2016 and 2017, is a proof that
10 my but-for calculation, which gets you to average
11 1.75 million, is conservative.

12 Now, we can go slice and dice, "you could
13 have done this country, that country," but generally
14 speaking, if you step back and look at it, my volumes
15 are declining because I tied them to Peruvian volumes.
16 I say "my volumes," volumes from other countries.

17 BY MS. HORMAZABAL

18 Q. Thank you. I'm going to go ahead to my last
19 question.

20 If you could please show AS-0066 and show
21 the inventory, Respondent's counsel have--also did not
22 provide you with the opportunity to reply regarding

1 this, if you could please expand to what you were
2 going to say?

3 A. I believe I mentioned that what's shown in
4 the Financial Statement as of 2018 reflects three
5 loads, and the loads that were acquired, load No. 3
6 and load No. 5 which are not reflected here, were
7 originally reflected in the Financial Statements, and
8 I show that it's in one of my exhibits. Over time,
9 the management/accountant decided to remove it because
10 they followed the Cash Basis. And as I said before,
11 as a CPA, as long as you believe that you're entitled,
12 you have a legal title to that gold, that gold should
13 have been on the balance sheet.

14 MS. HORMAZABAL: Thank you very much. I'm
15 done with my questions.

16 PRESIDENT McRAE: Thank you.

17 Any redirect?

18 MR. SMYTH: Recross.

19 PRESIDENT McREA: Recross.

20 MR. SMYTH: Just a few short questions. I
21 promise to be quick.

22 RE CROSS-EXAMINATION

1 BY MR. SMYTH:

2 Q. I wasn't sure if I heard correctly, but I
3 think you mentioned that you met [REDACTED] in Dubai,
4 was that correct or was that a misstatement?

5 A. I think I read Dubai but I stated Miami.

6 Q. Understood. So, you've never met [REDACTED]
7 in Dubai?

8 A. Never.

9 Q. "Never."

10 Okay. And we were talking about counsel for
11 Claimant asked whether you took into account
12 detrimental articles about Kaloti's reputation. Where
13 do you take those into account in your Reports?

14 A. In looking at the--there's no impact.
15 Everything was pure that I have seen that was
16 submitted by Brattle were pure allegations, and so
17 there is no effect. There is nothing to be taken
18 into. If they provided me with the data that shows,
19 clearly shows, that those allegations were correct, I
20 would have taken into account, but there is zero
21 evidence for that.

22 Q. So, to be clear, did you carry out your own

1 independent investigation of whether or not those
2 articles caused Kaloti to lose Suppliers or banking
3 relationships?

4 A. I have not, no.

5 Q. Okay. And just quickly on Exhibit C-43, if
6 we could pull that up. Claimant's counsel were asking
7 you some questions about this, specifically the
8 volumes at the end of certain years. And I think the
9 suggestion was that things slowed down at Christmas.
10 But, if we look at 2013, first of all. So, if we go
11 to--yeah, if we zoom in there, we have pure quantity
12 volumes November 2013, we have nearly
13 1.6 million grams, and then December 2013, we have
14 1.5 million grams. That's only a very small decrease
15 in December; correct?

16 A. Yeah, that's correct.

17 Q. And then in 2014, at the bottom of there,
18 November and December 2014, if we look at the pure
19 quantities, again, that's only a very small decrease;
20 correct?

21 A. In relation to those two months, yes.

22 Q. Yes. Okay. Thank you.

1 MR. SMYTH: No further questions.

2 PRESIDENT McRAE: Do we have questions?

3 Please go ahead.

4 QUESTIONS FROM THE TRIBUNAL

5 (Off the microphone.)

6 ARBITRATOR KNIEPER: I have some questions
7 on your Reports, both Reports, and I want to quote
8 some of the paragraphs of your Reports. You have them
9 in front of you; right?

10 THE WITNESS: I do.

11 ARBITRATOR KNIEPER: So, the easiest would
12 be because I have no way to bring it up to the screen,
13 to show you to give the numbers of the paragraphs, and
14 then you can look at them.

15 MS. HORMAZABAL: If you would like, you
16 could tell me the page number and I can ask--

17 ARBITRATOR KNIEPER: Page number? I have
18 the paragraph numbers.

19 MS. HORMAZABAL: The paragraph number,
20 that's what I meant.

21 ARBITRATOR KNIEPER: If that's okay?

22 MS. HORMAZABAL: Yes, absolutely.

1 ARBITRATOR KNIEPER: Now, let me start with
2 one. My first question, today I recall in your
3 presentation you said that KML does not refining; is
4 that correct?

5 THE WITNESS: That's correct.

6 ARBITRATOR KNIEPER: But, when you go to
7 your First Report at Paragraph 3.4--it's not a test
8 run, but it seems--you say: "KML was a mining company
9 which specializes in precious metals refining," et
10 cetera. Would you correct that after what you have
11 said today? Because it may have an impact on the
12 value of the enterprise.

13 THE WITNESS: I understand that the refining
14 is basically as some of those purchases they have
15 made. They would take to refineries, local
16 refineries. They would do refining for them and then
17 they would sell it. So, that would be going under the
18 refining section of the revenue. They, themselves,
19 did not have a refine.

20 ARBITRATOR KNIEPER: They did not refine.
21 So, because, on another, which I have noted now here,
22 you say also in the submission is that KML would send

1 the gold for refining also to Dubai.

2 THE WITNESS: That is correct.

3 ARBITRATOR KNIEPER: Okay. Second point,
4 which might also impact the value of the enterprise,
5 on several occasions you talk about the beginning of
6 the activities of KML in Perú, the beginning of
7 investment in Perú, and there are four references, and
8 I want to bring you to four. Perhaps you know that.
9 There is a Paragraph 2.11 in your First Report, and
10 then a paragraph where you say the Investment in Perú
11 started in 2011. And then there is another one, 2.1,
12 Paragraph 2.1, where you say the Investment started in
13 early 2012. And then there is a third one in 3.6 of
14 the first--am I too fast?

15 THE WITNESS: No, no.

16 ARBITRATOR KNIEPER: 3.6 where you say that
17 Kaloti--no, that KML opened a local office in early
18 2013.

19 What would be the right date of all these
20 three?

21 THE WITNESS: The--I have never gotten to
22 the level of knowing exactly when they made

1 investments.

2 ARBITRATOR KNIEPER: Okay.

3 THE WITNESS: But I do recall that the
4 initial transacting of acquisitions of gold started in
5 2012, and I believe that 256 kilograms that I kept
6 repeating is the total volume that they acquired in, I
7 believe, after that from what I was told, and I
8 remember--believe it was in one of the Witness
9 Statements, these are factual issues that the Kaloti
10 Metals & Logistics decided to make further investment
11 there and open up the office there, had a place for
12 people to stay, to live. The Transportation Agreement
13 was signed, the Security Agreement was signed, they
14 also had the storage space dedicated for those
15 separate things. That's what I refer to when I say
16 "the Investments were made."

17 ARBITRATOR KNIEPER: Because, when you
18 define "investment"--and I want to take you to
19 Paragraph 318 of the First Report and also to 6.78 of
20 the First Report. You say--and you define the
21 Investment of KML as "acquisition of gold."

22 And then in 6.78, when we go there--perhaps

1 we can put it on the screen because this is a little
2 bit longer. You say "Claimant's business operation is
3 limited to purchase and sale of the already-mined
4 gold."

5 Is that how you define the Investment of
6 KML?

7 MR. DÍAZ-CANDIA: Professor Knieper, I'm not
8 going to object to a question from an Arbitrator ever,
9 that would not unwise, but we submit that whatever is
10 an investment for accounting purposes or other
11 purposes is not necessarily what controls for Treaty
12 purposes, and this expert has no experience -
13 whatsoever in international law or the definition of
14 what an investment is.

15 ARBITRATOR KNIEPER: I thought investment is
16 also an economic term. I'm not talking about in the
17 legal definitions. I'm talking about the economic
18 term "investment."

19 MR. DÍAZ-CANDIA: Okay.

20 ARBITRATOR KNIEPER: I had the impression
21 that the CPA defined "investment" as saying the
22 Investment is the purchase of gold, and the operation

1 is limited to the purchase and sale of gold. This is
2 what I understood, and that is what I wanted to know
3 more about.

4 THE WITNESS: As I speak about the
5 Investment, I purely speak from an accounting and
6 financial reporting standpoint, and I'm speaking by
7 observing the balance sheet, what's reported there.
8 One of those, as I referred to, the purchase and sale,
9 one of those was the Investment in the inventory.
10 Inventory, by virtue, is always considered as an
11 investment, and that's what I refer to, in addition to
12 the other investments that were made.

13 I do want to make a note that, in some cases
14 there are some certain transactions or certain
15 arrangements that were more on a lease basis, and I
16 believe that's one of the reasons why the business
17 actually experienced lien, what I refer to as lien
18 operation. If they dumped significantly a lot more
19 money, let's say, by purchasing a tangible office--not
20 office, but whatever you want to purchase--you dump a
21 lot of money and that makes a lot more negative impact
22 on your immediate cash flows as opposed to entering

1 into a long-term arrangements, in which you pay
2 monthly.

3 ARBITRATOR KNIEPER: Thank you.

4 Then another question is, in that context,
5 when you talk about capital expenditure in 6.78 of
6 your First Report--no, 6.67, I'm sorry, of your First
7 Report, I have not found in the whole report and in
8 the balance sheets the expenses for this Arbitration,
9 which are considerable. You talk about expenses of
10 \$75,000 in 2018, but somewhere the money must come
11 from, is it a loan to KML which should be in the
12 balance sheet, or have you not been given information
13 on the costs?

14 THE WITNESS: I'm sorry, I didn't exactly
15 understand your question.

16 ARBITRATOR KNIEPER: The question is: This
17 Arbitration costs money, and it is provided by KML.
18 There is no third-party funding.

19 Now, doesn't that money has to appear
20 somewhere in the balance sheet?

21 THE WITNESS: The balance sheet that I have
22 is frozen as of year-end 2018.

1 ARBITRATOR KNIEPER: Okay.

2 THE WITNESS: The Company is--

3 ARBITRATOR KNIEPER: You've answer already
4 the question--

5 THE WITNESS: Nothing has been updated ever
6 since.

7 ARBITRATOR KNIEPER: Okay. So, the
8 last--also a short question concerns the damages, and
9 there I refer to the Second Report to two paragraphs.
10 One is in 5.49, and the other one is the 6.146, which
11 is already on the screen, perhaps it's still there,
12 where you talk about a red herring.

13 Now, you say in these two paragraphs that
14 the damages, the loss in value started--occurred as
15 from November 2013, and the unlawful and progressive
16 expropriation started also in November 2013. Is that
17 correct?

18 THE WITNESS: That is correct.

19 And when I made this statement, I referred
20 to the tangible information that I had on record.

21 ARBITRATOR KNIEPER: Yes.

22 You know why I asked this question, I asked

1 this questions because there was--the first day, I
2 think you were here the first day--there was a longer
3 debate about whether these temporary Measures at the
4 beginning were legal or illegal, but you seem to
5 confirm here or to affirm here that they were, in your
6 mind, illegal and unlawful from the beginning, from
7 November 2013. Is that what you want to say?

8 THE WITNESS: No, I do not provide an
9 opinion on that.

10 ARBITRATOR KNIEPER: Oh.

11 THE WITNESS: My calculation reflects the
12 instruction from a counsel, but I have no opinion
13 whether something was legal or illegal. That's
14 outside of my expertise.

15 ARBITRATOR KNIEPER: Okay. So, you put
16 these dates, November 2013, as instructed by the
17 Claimant; is that what you--

18 THE WITNESS: That's exactly correct.

19 ARBITRATOR KNIEPER: Okay. Thank you very
20 much.

21 PRESIDENT McRAE: Thank you very much. I
22 think there are no further questions. Thank you for

1 your testimony, and you're now free to go.

2 (Witness steps down.)

3 PRESIDENT McRAE: We are taking a lunch
4 break. Since we were starting late, we are happy to
5 go until 25 after 2:00 for lunch. We will do that and
6 then we will see how the afternoon goes.

7 MR. DÍAZ-CANDIA: Yes, Mr. President. We
8 just ask, just in case, and we don't know that Brattle
9 remains available tomorrow, please. Maybe we will
10 finish today, but we don't know.

11 PRESIDENT McRAE: I think that's quite
12 clear.

13 MR. SMYTH: I believe Brattle can make
14 themselves available tomorrow, if needed.

15 PRESIDENT McRAE: Okay. Well, then 25 after
16 we'll reconvene.

17 (Whereupon, at 1:24 p.m., the Hearing was
18 adjourned until 2:25 p.m., the same day.)

19 AFTERNOON SESSION

20 DARRELL CHODOROW and FABRICIO NUÑEZ,

21 RESPONDENT'S WITNESSES, CALLED

22 PRESIDENT McRAE: I think we are probably

1 ready to start.

2 Unless there is anything from either Party,
3 I think we can just go ahead and start with the
4 experts.

5 I know you were both here this morning, and
6 you heard what I said to the previous witness.

7 (Witness places nameplates on table.)

8 PRESIDENT McRAE: Thank you. That's
9 helpful. I have your names here, but I can see it
10 there. Thank you.

11 So, good afternoon, Mr. Chodorow; good
12 afternoon, Mr. Nuñez.

13 I think that, as you know, you will give
14 your statement, you will be cross-examined by the
15 Claimants, and then redirect by the Respondent, and
16 there may be question from the Tribunal.

17 Could we start by having you read the Expert
18 Declaration? I think it's slightly different from the
19 one that was read this morning.

20 Go ahead.

21 THE WITNESS: (Mr. Chodorow) I solemnly
22 declare upon my honor and conscience that my statement

1 will be in accordance with my sincere belief.

2 PRESIDENT McRAE: Go ahead.

3 THE WITNESS: I solemnly declare upon my
4 honor and conscience that my statement will be in
5 accordance to my sincere belief.

6 PRESIDENT McREA: Thank you.

7 I think there will be a brief introduction
8 from the Respondent?

9 MR. SMYTH: It's fine to just hand it over
10 to the Experts.

11 Maybe just one question, first of all.

12 DIRECT EXAMINATION

13 BY MR. SMYTH:

14 Q. You have your two Reports in front of you, I
15 believe.

16 A. (Mr. Nuñez) I do not.

17 Q. My question was simply, do you have any
18 corrections that you wish to make to your two Reports
19 filed in this Arbitration?

20 A. (Mr. Chodorow) No, we don't.

21 A. (Mr. Nuñez) We do not.

22 MR. SMYTH: Thank you.

1 PRESIDENT McRAE: Then please go ahead with
2 your presentations.

3 DIRECT PRESENTATION

4 THE WITNESS: (Mr. Chodorow) Good afternoon,
5 Mr. President, Members of the Tribunal. My name is
6 Darrell Chodorow, and this is my colleague,
7 Dr. Fabricio Nuñez.

8 We're principals with the Brattle Group in
9 the international arbitration practice where we focus
10 on quantum. So there are some details about our
11 background on Slide 1 and more details in the résumés
12 attached to our First Report.

13 I'm going to start with a brief summary of
14 conclusions, so from the--the Claimants are seeking
15 damages of approximately 155 million, and we were
16 asked to evaluate those claims. And a summary of our
17 conclusions is we start by analyzing the causal link.
18 And based off of our analysis, we conclude that there
19 is no significant documentary or analytical evidence
20 to support the alleged causal link. And,
21 additionally, we found significant evidence that
22 suggests other alternatives that explain KML's

1 deterioration.

2 We've also been asked to evaluate the Claims
3 for the lost profits and alleged expropriation. Based
4 off of our analysis, we conclude that, in this case in
5 particular, given the circumstances, the DCF is
6 particularly speculative and unreliable. We have
7 analyzed the results of Mr. Smajlovic's DCF, and we've
8 concluded that the model itself generates
9 unrealistically high profitability for KML, which we
10 take as a sign that the DCF contains unreliable inputs
11 and assumptions. And, as we'll also discuss, we've
12 evaluated many of those assumptions and reached the
13 same conclusion.

14 And finally, assuming a causal link, we have
15 prepared an alternative DCF analysis that we deem to
16 be more plausible, but still we have concerns about
17 reliability given the lack of information and data
18 available here.

19 We've also been asked to look at head of
20 damages related to the seized shipments, and our
21 primary concern with this analysis is that the
22 evidence available seems to contradict Mr. Smajlovic's

1 claim that KML has to pay for two of the shipments out
2 of any award; and, as a result, we believe that the
3 failure to make an adjustment for that would lead to a
4 windfall.

5 We will also address Pre-Award Interest,
6 which we think that the "commercially reasonable" rate
7 is lower than Mr. Smajlovic, and our estimate of
8 alternative damages across all the heads of damages is
9 approximately 14.5 million.

10 Just briefly, we're going to start
11 discussing the causal link. Then we will get into the
12 calculations of quantum, then talk about Pre-Award
13 Interest and, finally, provide our ending estimate of
14 damages.

15 (Pause.)

16 THE WITNESS: (Mr. Chodorow) So, starting
17 with the claim that Perú's Measures caused lost sales,
18 Mr. Smajlovic starts with the assumption that KML
19 would have grown rapidly but for the Measures but
20 instead it shrunk, and that the entire shortfall
21 between his but-for and actual estimates results
22 entirely from Perú's Measures which caused the alleged

1 short-fall in gold volumes through two key prongs.
2 The first is the loss of Suppliers to provide KML with
3 gold, and the second is the closure of KML's bank
4 accounts in the U.S. As we'll explain, we consider
5 these assumed causal links to be speculative and see
6 significant evidence to the contrary.

7 So, I'll start with the loss of Suppliers.
8 As we noted in our Reports, we don't see any analysis
9 or documents showing that Suppliers were lost, but we
10 have evaluated some of the Claims that are made in the
11 Memorial. And, for example, in the First Memorial,
12 there were claims that KML was buying from certain
13 Suppliers, and then after a certain period of time,
14 they would cease to sell to KML. And we found, using
15 KML's own data, that that claim was incorrect.

16 So, example, Veta de Oro, we found, I
17 believe the claim was, they stopped selling in 2015
18 but the supply records that we have seen posted, I
19 think there in C-30, they actually show Veta de Oro
20 continuing to sell in the following years, and that
21 volumes much larger than were sold at prior to the
22 alleged Measures.

1 And so, there seemed to be problems with the
2 factual record that the Claimant has been developing
3 to support the claim.

4 Additionally, KML asserts that there had to
5 be a substantial change in Suppliers as a result of
6 the Measures. Again, there is not any kind of
7 analytical support for this claim. We used the data
8 to actually try and assess whether this was true
9 because we could see what was happening to KML's
10 Supplier base over time, and one way to analyze this
11 is to look at the Supplier retention rate. So, if
12 there was a significant drop, if there were
13 substantial changes in the Supplier base, that would
14 appear as significant losses of Suppliers that were
15 previously supplying in prior years, and as you can
16 see on the right, we show the Supplier retention rate,
17 and it stays at about 50 percent for virtually the
18 whole time, but before and after. So, this
19 contradicts the claim of a substantial change in
20 Suppliers.

21 In addition, the fact that there is a
22 consistently relatively low rate shows that it is a

1 volatile market for Suppliers, and it's consistent
2 with materials that we saw suggesting that Suppliers
3 enter the market, and they'll trade for a short period
4 of time, and then they will exit the market.

5 Now, we've also found significant evidence
6 of other likely causes, so the first thing we will
7 note was discussed briefly this morning, which is when
8 you look at KML's monthly volume, there was a
9 significant drop in the volume in November of 2013,
10 and one of the things we heard about that, during
11 Mr. Smajlovic's presentation, is that the slowdown was
12 consistent with sort of a seasonal reduction. And we
13 haven't seen any evidence of that, but when you look
14 at the monthly data from other years, that's in, I
15 believe, Exhibit C-30, it seems to suggest there is no
16 consistent slowdown taking place, so that--we can't
17 disprove it, but the evidence seems it suggest that
18 that's not the explanation.

19 Additionally, you've heard discussion about
20 the Chamy family Suppliers. During 2013, these five
21 Suppliers in the group supplied 65 percent of KML's
22 total volumes, and they were concentrated in a

1 relatively short period of time, and those Suppliers
2 simply disappeared in 2014. So, the loss of this
3 enormous Supplier is a very plausible explanation of
4 what happened and could drive down KML's volumes.

5 We will also note that the artisanal gold
6 production sector experienced a sharp downturn, and
7 that's important because, as Dr. Nuñez will speak of
8 later, there was a significant--that was a significant
9 component of the potentially available supply for KML.

10 We've heard discussion about competition,
11 and this is something we address in our Report, but
12 part of the claim that [REDACTED] raises is that KML
13 was capturing volumes from incumbents, and it would do
14 so by offering a higher price.

15 But we also see evidence that competitors
16 were starting to respond. They're not just going to
17 sit and let Kaloti Metals take all their share.
18 They're going to respond, and one of their clear ways
19 that they respond is an example that was noted in an
20 article where they were interviewing people from NTR.
21 And NTR, one of the incumbents, said that after they
22 lost some share to Kaloti to--from [REDACTED]

1 business, they quickly tried to win him back by
2 offering significantly higher prices. And the
3 economic effect of that competition is going to be a
4 squeezing of either the volumes or the margins. You
5 can't have both.

6 Additionally, we will note that there is
7 good reason to believe that the reputation of [REDACTED]
8 [REDACTED], or [REDACTED], may have had an impact on KML's
9 business. As has been noted in [REDACTED] Witness
10 Statement, and I believe I've heard in the testimony,
11 the so-called "[REDACTED] letter" that talks about the
12 45,000 kilograms, that was used by [REDACTED] to try
13 and engage with Suppliers and to capture their supply.

14 So, in the market, KML would have been
15 clearly connected with [REDACTED]. And as we discussed in
16 our Reports, there was a significant amount of concern
17 about [REDACTED] activity. Some of it was public, some of
18 it was from activity of traders that were terminating
19 relationships, banks that were reporting [REDACTED] to
20 financial crimes regulators.

21 And this morning, there was the presentation
22 of an article that talked about all of the allegations

1 that came out in this Audit Report of [REDACTED]. And while
2 Mr. Smajlovic noted that there was nothing in--that
3 there was no evidence in 2012 and 2013, that the
4 allegations in these high profile articles and
5 publications like The Wall Street Journal, had a
6 significant effect. One wouldn't expect that because
7 those articles only came out in February of 2014, and
8 so you can't look back and say there was no--no impact
9 in prior years because that information either wasn't
10 available or certainly wasn't as high profile at the
11 time.

12 And so, we put forth these alternative
13 explanations that seem to have evidence and could very
14 reasonably be expected to harm KML's volumes with
15 Suppliers, and the Claimants have not engaged with any
16 kind of analysis or evidence to prove otherwise.

17 Next, I will turn to the closing of bank
18 accounts. In KML's Memorial they state, "the only
19 reason for KML or Mr. [REDACTED] to have been flagged
20 in compliance reviews performed by financial
21 institutions was directly and exclusively attributable
22 to Perú." Again, this is not supported by evidence

1 such as the closure letters, which we saw earlier
2 today, don't contain any explanation of why the
3 closures occurred.

4 But, in addition, we know from Brattle-003
5 that JPMorgan was already reporting KML, not just [REDACTED],
6 but also KML to financial crimes regulators in early
7 2013. Long before the Measures.

8 Additionally, when financial institutions
9 are considering opening an account, often times they
10 will perform KYC, or "know your customer" due
11 diligence. And despite the Measures, KML was able to
12 pass KYC due diligence and opened up six new bank
13 accounts following the Measures. And importantly, all
14 of the closures that occurred and are noted in Exhibit
15 C-27, they all occurred after the banks would have
16 seen what KML was doing in its accounts, the type of
17 counter-parties it had, the types of transactions it
18 was doing, and banks are oftentimes cautious, and they
19 are more than willing to close accounts so that they
20 are not affiliated with any kind of wrongdoing. And
21 so, just the perception of suspicion is enough to
22 result in a closed account.

1 Now, we saw from the JPMorgan SAR that, even
2 in early 2013, there were significant concerns about
3 the ties to ■■■, about the other counter-parties with
4 whom KML was transacting and that JPMorgan Chase found
5 the types of transactions occurring to be suspicious,
6 and those were significant enough to report to
7 regulators. And what we can see is that--also that
8 the closings that are complained of in Exhibit C-27,
9 those started to occur after the allegations of
10 wrongdoing in these high- profile journals such as The
11 Wall Street Journal.

12 On this slide, we just present a timeline
13 associated with the opening and closing of bank
14 accounts, and there are a few important things to
15 note. The first is, as has been discussed, both the
16 Citibank and JPMorgan accounts were closed prior to
17 the Measures. And as was noted earlier, we don't know
18 the exact reason. And we explained in our Report that
19 it seemed likely to us that the explanation was the
20 closures--although we didn't provide a specific
21 opinion that that was the case, that they were, for
22 sure, closed by the banks. But also, you have the

1 reporting by JPMorgan to the financial crimes
2 regulators prior to this period.

3 The next thing to note is the boxes in
4 yellow. Those are all of the new accounts that KML
5 was able opened despite Perú's Measures, and you'll
6 note that all of those openings happened after the
7 publication of The Wall Street Journal and other
8 articles about [REDACTED]; and also, all of the closures that
9 are contained in C-27 also occurred after that date.

10 And just to briefly address the alleged
11 insolvency, KML claims that the seized shipments made
12 it insolvent as of 30 November 2018 causing an
13 indirect expropriation. We note that this didn't lead
14 to a filing for bankruptcy. We explained that there
15 was some arbitrariness in this date because it was
16 based off of the date of a purported write-down of the
17 inventories.

18 And, finally, we will note that the alleged
19 insolvency would have been driven, in significant
20 part, by the factors that caused KML's business to
21 deteriorate in the period leading up to 2018. And so,
22 we don't see a strong--we don't see a strong claim or

1 tie to bring this to a particular date based off of
2 the evidence on which the opinion by Mr. Smajlovic was
3 reached.

4 I'm going to turn it over to my colleague,
5 Dr. Nuñez.

6 THE WITNESS: (Mr. Nuñez) Thank you,
7 Mr. President and Members of the Tribunal.

8 I want to turn our attention now to the
9 discussion of the first two heads of damages that KML
10 claims. That's the alleged lost profits and alleged
11 expropriation. And I want to do that in two steps.
12 First, I'm going to discuss Mr. Smajlovic's DCF,
13 Discounted Cash Flow Model approach, and I will point
14 out the significant deficiencies that render that
15 analysis speculative and unsupported.

16 And then, I'm going to spend a few minutes
17 talking about our corrected estimate.

18 As I said, Mr. Smajlovic estimates damages
19 using a Discounted Cash Flow Model, a DCF Approach.
20 But the facts of the circumstances that we have in
21 this case made that--have all the hallmarks that make
22 that approach speculative. On this table, on the left

1 column, you have--we have put.

2 (Pause.)

3 THE WITNESS: (Mr. Nuñez) --a set of
4 criteria that increase the reliability of a DCF
5 Approach, and on the right column we have answered
6 whether those conditions are met in this case.

7 For example, a DCF Approach is more reliable
8 when the business that has been valued has a long
9 operating history. Well, that's not the case here.
10 KML has not--doesn't have a long track record. It had
11 been operating for about 15 months in Perú. The
12 operational history is very uneven with ups and downs,
13 and it was distorted by a few anomalous months.

14 Similarly, a DCF is more reliable if it's
15 based on contemporaneous business plans that are not
16 on the record in this case.

17 A DCF Approach is also more reliable if the
18 business that is being valued operates in stable
19 market conditions, with stable profit margins, when
20 you can find a sustainable competitive advantage, and
21 predictability of Suppliers and Buyers. None of those
22 apply here. The market was not stable. [REDACTED]

1 himself has claimed that he disrupted the market by
2 offering Suppliers a higher price. That doesn't mean
3 that margins would remain like that because--or remain
4 high because competitors would respond undercutting
5 margins in order to reclaim Market Share. That's
6 exactly what happened here.

7 There was no sustainable competitive
8 advantage because there was nothing--there was
9 not--the business model of KML can be easily
10 replicable. There is no predictability of Suppliers,
11 there is no long-term or even short-term contracts.
12 In a market that is characterized by high turnover of
13 Sellers that they get in and out in a matter--in a
14 short period of time. And there is no predictable
15 Buyers. There is no economically enforceable Contract
16 with [REDACTED] or other Buyers.

17 The speculative nature of the DCF that
18 Mr. Smajlovic presents here becomes very clear once
19 you analyze in detail the assumptions that he makes.
20 On this table on the left side, we show the key
21 assumption in his model, and on the right we provide
22 the reason why we conclude that the assumption is

1 speculative and unreasonable.

2 Take, for example, Market Share. He assumes
3 that KML would reach a market share, a large market
4 share, even though of the total Perú market, even
5 though there is a large portion of the market that is
6 not accessible to KML.

7 Similarly, he makes speculative assumptions
8 about volume growth, the nature of competition, the
9 stability of and--level and stability of profit
10 margins, risk adjustments, discount rate, and taxes.
11 Which I will address in the following slides.

12 Let me talk about market share.

13 Mr. Smajlovic assumes that KML will capture
14 approximately 21 percent of the total gold market in
15 Perú, but that fact ignores that there is a large
16 portion of that market that is not accessible to KML.
17 It's not addressable in economic parlance. The pie
18 chart that you have on this table--on the slide,
19 breaks down the total gold market in Perú by segment.
20 The blue and the green portions corresponds to medium
21 and large gold producers. That accounts for
22 70--approximately 7 percent of the market. The blue

1 portion, approximately 43 percent, are medium and
2 large producers that are known to bypass
3 intermediaries. As a matter of fact, we have put in
4 our record in our Reports that we have confirmed that
5 to be the case. The 27 percent in green are medium
6 and large producers that are likely to bypass
7 intermediaries.

8 To be clear, none of the companies that
9 account for that 70 percent of the market are listed
10 on this list of Suppliers to KML, with the single
11 exception of a small, miniscule transaction in 2017
12 that accounted for a very small part of the volume
13 traded by KML that year.

14 So, with this evidence, it's reasonable to
15 conclude that the addressable market for KML
16 corresponds to artisanal and other producers, the
17 29 percents that is labeled or is colored in pink and
18 yellow.

19 Let me put that 21 percent Market Share that
20 Mr. Smajlovic assumes in the context of that
21 addressable market.

22 What Mr. Smajlovic assumes is that the

1 but-for volume would capture approximately 70 to
2 90 percent of that addressable market, and they will
3 be able to do that at a pace of growth unprecedented
4 for KML. But a Buyer or a market participant with
5 such a dominant position of 70 to 90 percent could be
6 unsustainable unless there is competitive advantage or
7 barriers to entry. As I said, none of that exists
8 here.

9 When economists think about barriers to
10 entry, you think about things like intellectual
11 property, exclusivity of Suppliers, territorial
12 exclusivity or a business model that cannot be easily
13 replicable. That is not the case here.

14 Mr. Smajlovic also assumes that the profit
15 margins, particularly the price-fixing margin, would
16 be 1 percent exactly, but as you can see on the slide
17 presented on the table or the chart--on the slide,
18 that 0.1 percent margin is excessive. The average
19 before and after the Measures was much lower; and, as
20 you can see, that is very volatile.

21 Because of the volumes and the margins that
22 was discussed this morning are so razor thin, small

1 changes in that level produces a large damages impact.
2 And as you can see, it's not stable. The margins
3 fluctuated significantly, and that volatility implies
4 that there was risk, which is something that I want to
5 talk next.

6 Mr. Smajlovic claims to have made a number
7 of risk adjustments to his cash flows, but that claim
8 is incorrect. Let's say volumes, for example. He
9 says that he assumes that Perú volumes of
10 33,000 kilograms a year is the risk--is risk-adjusted
11 because that number is below the 45,000 tons that was
12 noted in the [REDACTED] letter. But to be clear, there is no
13 analysis of volume risk. Mr. Smajlovic has not put on
14 the record any analysis that can justify 33,000 or any
15 volume for that matter.

16 He also says that his price forecasts are
17 risk-adjusted because he relies on future contracts,
18 and those are risk-adjusted. Well, we agree that
19 price--that future contracts, gold future contracts
20 are risk-adjusted. They are, by definition, they
21 remove the uncertainty by definition. It's a contract
22 in which the Parties agree to transact a commodity in

1 the future for a fixed price or a given price. But
2 that's not what he uses in his analysis. Future
3 contracts are only available until 2024. After that,
4 he relies on price forecasts for analysts. Those are
5 certainly not risk-adjusted, and he makes no analysis
6 of price volatility of those forecasts or anything
7 that he does to account for that.

8 He also says that there is no price-fixing
9 risk because of the strategy that KML allowed them to
10 maintain a stable Profit Margin. I already showed in
11 the previous slide that that is not correct either.

12 Finally, he says that the relationship with
13 [REDACTED] was key to KML's value and would continue until
14 2048. Let me leave for a moment what value that
15 implies, but for this purpose there is--even if we
16 assumed that is the case, if you have a single Buyer
17 with such concentration risk, there is a risk. He
18 does no analysis of what that implies, especially
19 because there is no agreement with predictable terms
20 that will prevent [REDACTED] from going to a different
21 Seller.

22 And as we have just discussed, [REDACTED]

1 reputational risks endangers KML's reputation with his
2 Supplier--with their Suppliers and their banks.

3 Let me turn to the issue of the Discount
4 Rate. Mr. Smajlovic uses an approximately 5.2
5 Discount Rate. He arrives to that number as the sum
6 of the U.S. Treasury rate plus a 2 percent premium.
7 The 2 percent premium, the 2 percent risk premium is
8 arbitrary. He talks about being connected to a
9 country risk, but there is no analysis behind it.

10 He also justifies, Mr. Smajlovic justifies
11 that low Discount Rate on the basis that the cash
12 flows are risk-adjusted, and he can use a lower
13 Discount Rate, but I just told you that the risk on
14 the cash flows has not been adjusted.

15 By the way, that rate--the Discount Rate is
16 below the Pre-Award Interest Rate that he uses, so
17 that implies that KML would be better off delaying
18 receiving the payment of an award. That is an issue
19 that at least receives investigation. We did. We
20 pointed that out, and that defies economic logic.

21 Mr. Smajlovic provides what purports to be
22 two tests of the reasonability of his Discount Rate.

1 When putting into context and properly analyzed, those
2 two--that is incorrect. First, he says that his 5.2
3 is below the 3.8 Discount Rate that Barrick Gold uses
4 in his Perú operations. The rate is not quoted in
5 real terms--it is not quoted in nominal terms, isn't
6 in real terms, so by the time you adjust for
7 inflation, is actually higher than the 5.2

8 Then he says the other benchmark that he
9 uses is that, he claims that the Discount Rate of 5.2
10 is higher than the 4.2 reportedly calculated and based
11 on data from Professor Damodaran of NYU. Well, the
12 WACC properly applied is 8.4. The discrepancy arises
13 because Mr. Smajlovic uses some of the inputs but
14 changes others, changes the calculation in a way that
15 violates the principles of finance.

16 Let's talk a little bit more--let me talk a
17 little bit more about the [REDACTED] relationship and the
18 letter. Smajlovic says that the relationship with [REDACTED]
19 is one of the most important factors in the business
20 and the DCF, his analysis, assumes a continuing
21 relationship. But the letter only--if you believe the
22 letter--only has 45,000 kilograms. That's below the

1 69 or 70,000 tons--79 kilograms noted in the letter.

2 (Pause.)

3 THE WITNESS: (Mr. Nuñez) The letter quotes
4 45,000 kilograms which is below the 70,000 kilograms
5 that are in his but-for analysis in the total volumes.
6 Perú is 33, and the rest of it is other countries.

7 Importantly, that letter lacks key terms of
8 that provide certainty in medium and long-term
9 commodity agreements. It is not an Off-Take Agreement
10 or a long-term supply agreement. Typically, you have
11 in those types of Contracts a mechanism to set the
12 price, the volumes, the point of delivery, whether
13 it's Free on Board, at the gate, includes freight and
14 insurance, and other conditions for the allocation of
15 risk. None of that is present in that letter.

16 Importantly, the Defendants and [REDACTED] and as
17 has been discussed already is risky given the
18 allegations of wrongdoing and compliance failures, but
19 let me stop here. And assume for the sake of the
20 argument that that letter has value. It has value to
21 [REDACTED] and even the Shareholders of KML, but it
22 should not be incorporated in the FMV, in the Fair

1 Market Value of KML because that letter is--the value
2 of that letter is provided by family bond that cannot
3 be passed on to a potential Buyer. It is, what in
4 economics, we call the "strategy value." The
5 strategic Value is not Fair Market Value.

6 Let me turn to the issue of taxes.
7 Mr. Smajlovic initially applies a Tax Rate on Perú,
8 and in his Second Report he removed all tax liability.
9 Well, our conclusion is that no rational Buyer would
10 ignore such types of liability because there is two
11 problems. He claims that those taxes can be ignored
12 because KML is a pass-through entity and they wouldn't
13 have been subject to taxes. Well, a couple of
14 problems with that. First, it doesn't--being a LLC or
15 a pass-through entity does not insulate KML from taxes
16 outside of the U.S.

17 And, second, potential buyers would discount
18 in the Fair Market Value of the taxes that they would
19 pay. The reason is that the corporate structure of
20 KML does not change the tax liability. It changes, it
21 shifts who pays for it. In this case, it certainly
22 would pass to KML up to the Shareholders, but somebody

1 would pay. But because of the way Mr. Smajlovic
2 approaches this, essentially it's a backdoor of a
3 gross-up that would benefit provide a windfall to KML
4 Shareholders that are not Claimants.

5 Let me talk about [REDACTED]. We
6 talked about this--there has been talk about [REDACTED]
7 [REDACTED]. [REDACTED] formed [REDACTED] before the
8 alleged expropriations. And we have heard testimony
9 and we have provided testimony ourselves that there
10 was an overlap of the Suppliers that were trading or
11 providing--supplying gold to KML as [REDACTED].

12 And, importantly, [REDACTED] ability to
13 form [REDACTED] actually depresses KML value,
14 because for one, it confirms that there's low barriers
15 to entry, all you have to do is form a new company and
16 off you go. And potential Buyers would discount KML's
17 value due to the threat of possible competition of
18 [REDACTED] or other potential new entrants.

19 Let me discuss now the Market Method.
20 Mr. Smajlovic reports to have conducted a
21 reasonableness checks on his DCF based on a company
22 called ALS. At the core of a Market Method is to

1 identify reasonable, reliable comparables. ALS is not
2 a reliable comparable. In this pie chart on the left,
3 we have broken down the revenue sources of ALS.
4 36 percent is in the commodities sector, and
5 64 percent is not commodity. Mr. Smajlovic's claim of
6 comparability relies on that 36 percent, but even that
7 36 percent is not comparable. It has no trading
8 activities, is not primary on gold. It's only a small
9 share of participation in Perú, and it focuses on
10 Technical Services.

11 Putting aside the issue of comparability,
12 the method itself that he applies is not an
13 independent check, and the reason is simple:
14 Anchoring both his DCF analysis as well as this
15 comparable approach is his assumed but-for approach.
16 Any problem or EBITDA, any problems that are present
17 in his own analysis, in his assumption, infects,
18 contaminates both the results of a DCF analysis as
19 well as the results of his comparable analysis. In
20 other words, there is not an independent check on his
21 DCF.

22 In contrast, we have prepared--we have

1 conducted our own comparables analysis with references
2 up to two transactions to refiners, Valcambi and Rand.
3 We have made clear that we understand that these are
4 not perfect comparables but they're reasonable as a
5 check.

6 When you do an analysis on a per ton of gold
7 processed, Valcambi and Rand should be more valuable
8 than KML, and the reason is simple: These two
9 companies have their own refining capacity, they
10 provided value-added services that KML does not.

11 But illogically, as we have shown in this
12 chart on this slide, Mr. Smajlovic's DCF implies that
13 KML is worth significantly more per ton of gold
14 through-put than Valcambi and Rand.

15 We did another check on the reasonability of
16 that DCF, and that is, on the basis of comparing, the
17 implied returns on Mr. Smajlovic's DCF cash flows to
18 the annual return that Apple, a very successful stock,
19 has yielded over time. His DCF implies extraordinary
20 terms, more than two times those of Apple. And those
21 high returns defy economic logic. Apple is a company
22 with brand loyalty, with competitive advantage, with a

1 business model that is difficult to replicate.
2 Mr. Smajlovic, DCF, is for a company KML which is not
3 protected by barriers to entry, is subject to
4 competition, and doesn't have a business model that
5 cannot be replicated.

6 I'm going to conclude with a corrected
7 estimate. We have been instructed to estimate lost
8 profits and alleged expropriation using the DCF and
9 assuming the causal link. It doesn't mean that we
10 agree with those conditions; as we said, the DCF is
11 speculative, and Mr. Smajlovic has not proved causal
12 link. So, all we're really doing is replacing the DCF
13 inputs with what we considered to be more reasonable
14 ones.

15 And, on this table, I leave you with the
16 corrections, with individual corrections, that we have
17 made to his DCF, eight in total, that the decrease or
18 reduce his alleged expropriation and lost profit
19 damages from 103 and change to approximately
20 13.7 million, and that is before applying
21 Mr. Smajlovic's deductions to avoid double-counting
22 for the inventory, which is an issue that Mr. Chodorow

1 will discuss next.

2 Thank you.

3 THE WITNESS: (Mr. Chodorow) Thank you.

4 So, now I'm going to turn to the damages
5 related to the seized shipments.

6 We have been asked to calculate these
7 damages, assuming that each shipment was legally owned
8 as well as the assumption that each shipment was
9 either illegally seized or subject to an attachment.
10 And so, please note that, that caveat to our analysis.
11 As was discussed earlier, the Shipments 3 and 5 are
12 not part of KML's inventory in its Financial
13 Statements, which raises questions as to
14 their--whether they are legally owned or not.

15 When it comes to the calculation of these
16 damages, Mr. Smajlovic agrees that Shipments 3 and 5
17 were never paid for, but are used--and he corrected
18 this morning that KML's--that they were audited, but
19 he argues that the KML financials show that KML would
20 have to pay for those shipments out of any award. And
21 this claim we find to be incorrect, and we find it to
22 be incorrect because when we look as those Financial

1 Statements for 2018, they show no liability to pay for
2 either shipment going forward. Yet Mr. Smajlovic
3 says, he confirmed based on his Financial Statements
4 the obligation to pay.

5 Beyond this, we will note there are two
6 other issues. The first is that he has taken the pure
7 gold volumes associated with these shipments and
8 values them at the price for gold that has already
9 been refined. But recall that these shipments are
10 unrefined, and it takes time, and it takes money in
11 order to move from unrefined gold to refined gold and
12 so you need to make a price adjustment for the
13 unrefined state associated with those inventories, and
14 that's something that Mr. Smajlovic, even after
15 hearing our argument, has rejected for reasons that we
16 don't fully understand. I think he's confusing our
17 adjustment for the refining related to the difference
18 between the gross and the pure weight, but that's not
19 what this is about. This is that the--the pure weight
20 can only be unlocked by spending money to get these
21 shipments refined, and so, the pure weight volume in
22 those shipments must be worth less than the value of

1 the gold once it's refined.

2 Additionally, we raised questions in our
3 First Report because we identified that there were two
4 different volumes for each of those shipments in
5 Mr. Smajlovic's report, and in his Second Report he
6 revised it with one further estimate for the volumes
7 for the shipments. And we don't know which, if any,
8 of these is incorrect. We haven't been able to
9 discern that from the documents.

10 On this slide, we show our calculation of
11 the estimated damages for the seized shipments, and we
12 are making the adjustment for the price for the
13 unrefined status of the gold, and we're also deducting
14 out the cost for the shipments that were never paid
15 for to avoid a windfall, and that estimate ends up at
16 about \$12.2 million using the prices as of
17 30 November 2018.

18 We will note one other consideration, which
19 is it's our understanding that KML may not have paid
20 in full for the other three shipments; and, if that's
21 the case and there is no clear obligation for KML to
22 make payment of the remaining amounts on those

1 shipments, that could potentially generate another
2 windfall.

3 With respect to Pre-Award Interest,
4 Mr. Smajlovic uses an estimate of LIBOR + 4%. That's
5 represented by the green bars on this chart. That is
6 intended to reflect the cost at which KML is borrowing
7 funds, but that's different in economic substance from
8 the nature of damages, and those can be thought of
9 kind of as the economic equivalent of a loan from KML
10 to Perú.

11 And the "commercially reasonable" rate of
12 interest should reflect the risk associated with that
13 loan, and we understand that there are arguments that
14 there can't be risk of non-payment on an award before
15 the Award is issued; and, if that's the legal
16 conclusion, something we don't opine on, then the
17 appropriate Pre-Award Interest Rate is the risk-free
18 U.S. dollar rate.

19 If, however, damages are subject to the risk
20 of non-payment by Perú looking backward to the date in
21 which the damages are incurred, then it would be
22 appropriate to use Perú's U.S. dollar borrowing rate

1 because that's the rate at which market participants
2 willingly lend money to Perú. And as you can see on
3 the chart, either the Risk-Free Rate or Perú's U.S.
4 dollar borrowing rate are both substantially below
5 LIBOR + 4. And so, we disagree with Mr. Smajlovic's
6 rate because we think from an economic perspective,
7 it's just not measuring the right thing when it's
8 asking the question of what a "commercially
9 reasonable" rate is.

10 Finally, moving to damages, the combined
11 damages across the three heads of damages, we estimate
12 they were 14.3 million for the lost profits and
13 alleged expropriation in the first column; for the
14 seized shipments, including interest, we estimate it
15 was 13 million; and then, when you combine them, you
16 can't simply add them because, as Mr. Smajlovic
17 notes--and we agree--there is double-counting if you
18 were to do that. And so, we make the same adjustment
19 to avoid double-counting by taking out the costs
20 related to the three shipments that were paid for in
21 order to get our estimate of total damages of
22 14.4 million. Now, if you were to do that at Perú's

1 borrowing cost, the damages would be 14.6 million.

2 And, finally, I will just note that there
3 were many claims in Mr. Smajlovic's presentation about
4 the arguments and analysis in our Report, we strongly
5 disagree with those, but we don't have the time to
6 delve into each of those at this point, but we
7 would--we have addressed these issues in our Reports,
8 and we would also welcome any questions to try and
9 clarify the differences and opinion between our views
10 and those of Mr. Smajlovic.

11 Thank you.

12 PRESIDENT McRAE: Now we turn to the
13 Claimants. We will ask them to start with the
14 cross-examination.

15 MS. HORMAZABAL: Thank you, Mr. President.

16 CROSS-EXAMINATION

17 BY MS. HORMAZABAL:

18 Q. My name is Gabriella Hormazabal, and I will
19 be conducting this cross-examination. And for the
20 sake of time, especially since there are two of you, I
21 ask that you reply "yes" or "no" to my questions that
22 require a "yes" or "no" answer. You will have time to

1 expand, if you wish, during Respondent's counsel's
2 time for rebuttal.

3 Is that agreed?

4 A. (Mr. Chodorow) We will do our best.

5 Q. Thank you.

6 Mr. Chodorow, we understand that you may
7 have worked with a professor of accounting in
8 university, but is it correct that you do not have a
9 degree in accounting?

10 A. (Mr. Chodorow) That's correct. I taught
11 sections in financial accounting.

12 Q. Thank you.

13 A. (Mr. Chodorow) At the Yale School of
14 Management.

15 Q. You're not a certified public accountant
16 either; is that correct?

17 A. (Mr. Chodorow) That's correct, but I'm--

18 (Overlapping speakers.)

19 A. (Mr. Chodorow) I'm not a CPA, but I'm a
20 regular user of financial statements and I understand
21 key accounting issues.

22 Q. Again, you were not a CPA, thank you.

1 You are also not a professional, a
2 certified--you're not a professional accountant and
3 have no formal training in financial reporting in
4 GAAP; is that correct?

5 A. (Mr. Chodorow) Sorry, you said no formal
6 training?

7 Q. Yes.

8 A. (Mr. Chodorow) I don't think I would agree
9 with that. I've certainly taken accounting courses.

10 Q. But you don't have--

11 A. (Mr. Chodorow) But, like I said, I'm not a
12 CPA. But accounting has been a critical part of both
13 my undergraduate and graduate training.

14 Q. Thank you.

15 But you do not have a certification.

16 A. (Mr. Chodorow) That's correct.

17 Q. You're also not a Certified Valuation or
18 Business Analyst, or as we call it, a "CVA"; is that
19 correct?

20 A. (Mr. Chodorow) That's correct.

21 Q. Mr. Nuñez, you have also never indicated
22 that you have a degree in accounting; is that correct?

1 A. (Mr. Nuñez) That's correct.

2 Q. You're not a certified public accountant or
3 as we call it, a CPA.

4 A. (Mr. Nuñez) I am not.

5 Q. You're not a professional accountant and
6 have no formal training in financial reporting in
7 GAAP; is that correct?

8 A. (Mr. Nuñez) I disagree. During my graduate
9 training in my Ph.D. in economics you have to take
10 accounting.

11 Q. And you are also not a certified valuation
12 or business analyst.

13 A. (Mr. Nuñez) I am not.

14 Q. Would you agree with me that a CPA trained
15 in accounting and GAAP possesses additional knowledge
16 in how Financial Statements are prepared and which
17 accounting principles are followed? This is a key
18 requisite of performing financial system statement
19 analysis; is that correct?

20 A. (Mr. Chodorow) I disagree. There are many
21 users of Financial Statements throughout the world
22 that are not CPAs. CPAs may be required to legally

1 prepare Audited Financial Statements, but users that
2 have MBAs or Ph.D.s throughout the world are relying
3 on these Financial Statements, even if they're not
4 CPAs to make these important business decisions.

5 Q. Thank you. Are you qualified to audit a
6 Financial Statement?

7 A. (Mr. Chodorow) No, I'm not.

8 Q. Have either of you ever worked in any of the
9 Big Four audit firms?

10 A. (Mr. Chodorow) No.

11 A. (Mr. Nuñez) I have not.

12 Q. You have both said that you are members of
13 an international arbitration market--practice. Does
14 that practice include arbitration valuation of
15 going-concern businesses not subject to litigation?

16 A. (Mr. Chodorow) I have done that in the
17 course of my business, yes.

18 Q. Does that involve a valuation of businesses
19 that are not in litigation, in your present group?

20 A. (Mr. Chodorow) Well, so, most of my work is
21 in international arbitration, but I do a lot of
22 different--a lot of different things. Sometimes the

1 work that I do is advisory. I've valued a wide
2 variety of different assets for people that are
3 considering transactions or considering making major
4 investments.

5 Q. Is this in the International Arbitration
6 Group?

7 A. (Mr. Chodorow) The groups at Brattle, they
8 are loose affiliations. I have clients that for which
9 I do all sorts of valuations. I think actually in my
10 CV I point to all sorts of valuation work that I've
11 done. Some of it is related to litigation, and others
12 are not.

13 Q. Am I correct to say that an international
14 arbitration involves the practice of advocacy?

15 A. (Mr. Chodorow) No. We are independent
16 experts.

17 Q. That's not the question I asked.

18 A. (Mr. Chodorow) I apologize. I misheard.

19 Q. Am I correct to say that an international
20 arbitration practice involves the practice of
21 advocacy?

22 A. (Mr. Chodorow) I think I'm confused. We're

1 independent experts. We're not lawyers, so we're not
2 advocates.

3 Q. Okay. Well, your Reports certainly seem
4 argumentative to us.

5 MR. SMYTH: Is that a question or is that
6 just a statement?

7 MS. HORMAZABAL: I will move on.

8 BY MS. HORMAZABAL:

9 Q. Mr. Nuñez, are you currently serving as the
10 Expert on behalf of Perú on another matter?

11 A. (Mr. Nuñez) Yes.

12 Q. How many times have you served as an expert
13 for Perú?

14 A. (Mr. Nuñez) This is the--this is--just those
15 two cases, this one and that one you referred to.

16 Q. Mr. Chodorow, how many times have you served
17 as an expert for Perú?

18 A. (Mr. Chodorow) I have never served as an
19 Expert for Perú.

20 Q. How much were you or the Company you work
21 for, Brattle, paid so far in this Arbitration?

22 A. (Mr. Chodorow) I would have to go back and

1 look. I don't know the number.

2 Q. You can give me an estimate or a ballpark,
3 if you don't know the exact number.

4 A. (Mr. Chodorow) It's probably about \$450,000
5 is where I expect the totals billings will be.

6 Q. So, you have not been paid all of the fees
7 so far?

8 A. (Mr. Chodorow) We're paid on an hourly
9 basis.

10 Q. So, you have not been paid for the
11 Hearing--this Hearing today?

12 A. (Mr. Chodorow) Correct, although our views
13 are not contingent upon the results of this Hearing.

14 Q. Mr. Nuñez, how much were you or the Company
15 you work for, Brattle, being paid or will be paid for
16 the other matter you are working on for Perú?

17 MR. SMYTH: Objection, sir.

18 A. (Mr. Nuñez) I have no idea.

19 MR. SMYTH: Has no relevance, and
20 inappropriate.

21 MS. HORMAZABAL: I will withdraw.

22 BY MS. HORMAZABAL:

1 Q. Discounted Cash Flow Method or DCF is a
2 specific method that falls under the Income Approach;
3 is that correct?

4 A. (Mr. Nuñez) Yes.

5 Q. If you would like to let me know which one
6 of you that wants to answer certain questions, thank
7 you.

8 Both you and Mr. Smajlovic have presented
9 damages to KML using the DCF Method in this
10 Arbitration; is that correct?

11 A. (Mr. Nuñez) Yes, with the caveat that we--

12 Q. Thank you.

13 A. (Mr. Nuñez) --spent 45 minutes explaining
14 why it's speculative.

15 Q. Yet you still used it; correct?

16 A. (Mr. Nuñez) This is speculative and we have
17 done corrections, adjustments that's more reliable but
18 that's not the approach that we--

19 Q. Did you propose a different main method? I
20 understand that you may have shown us some Market
21 Approach methods, but you still rely on the DCF Method
22 in this case; is that correct?

1 A. (Mr. Nuñez) We make corrections to
2 Mr. Smajlovic's DCF with the assumptions of the
3 caveats that I have--that we have discussed.

4 Q. Did you propose a different method as more
5 appropriate? That is my question.

6 A. (Mr. Nuñez) We did not. We were not asked
7 to consider any other method.

8 Q. Thank you.

9 Is it fair to say that the DCF Method is
10 well suitable for projects in the precious metal
11 industry due to the fact that the production output
12 are commodities, the markets are well developed,
13 markets are highly liquid, they're global in scope,
14 and with little uncertainty regarding producers'
15 ability to find Buyers? Is that correct?

16 A. (Mr. Nuñez) I would have to disagree with
17 that. I can put you many examples of very risky
18 mining projects on gold or other things that are not
19 predictable, that are not well developed, and they are
20 risky, for example.

21 Q. What method would you propose that should be
22 used in this industry, then?

1 A. It depends on the Company.

2 The problem is that the DCF, as I explained,
3 is suitable when there is a long, for example, long
4 track record which--

5 Q. My question was--

6 MR. SMYTH: Excuse me, Mr. President, I hate
7 to interrupt the cross-examination, but there have
8 been a number of occasions now where the Expert has
9 been asked a question, is midway through answering it,
10 and then counsel for Claimant will interrupt, and I
11 just think for the sake of the Court Reporter and
12 Interpreters at least, we would ask that the Witness
13 be allowed to answer the question.

14 MS. HORMAZABAL: The Witness isn't answering
15 my question, but I will let him--

16 PRESIDENT McRAE: You have to let them
17 explain the answer, if they gave an answer they have
18 to explain it, unless it's an obvious "yes" or "no"
19 question.

20 MS. HORMAZABAL: Understood.

21 BY MS. HORMAZABAL:

22 Q. So, what is the method that you think is the

1 most appropriate in this industry?

2 A. (Mr. Nuñez) Of the Valuation Approaches? I
3 can think of, for example, the Cost Method could be
4 something that you could apply here.

5 Q. You think it's more appropriate?

6 A. (Mr. Nuñez) It's less speculative than a DCF
7 and because it's hard to find comparables, yes.

8 Q. So, it's normally used; is that correct?

9 A. (Mr. Nuñez) Can you repeat the question?

10 Q. The Cost Method is a method that is commonly
11 used in this industry.

12 A. (Mr. Nuñez) Again, it depends, there might
13 be--in all industries, in all types of projects, there
14 are situations in which the Cost Method might be
15 appropriate, and in the same industry for other--in
16 other circumstances, the DCF must be--might be more
17 appropriate. It depends.

18 Q. Is that something that you have provided in
19 your Report?

20 A. (Dr. Nuñez) We were not asked to do that.

21 Q. Please confirm that all of the documentation
22 that you have relied upon is listed in your Appendix B

1 of your First Report and Appendix A of your Second
2 Report.

3 A. (Mr. Nuñez) Yeah, those were documents that
4 were relied upon.

5 Q. Did you decide not to rely on certain
6 documents in this case, or did you use every single
7 document you received?

8 A. (Mr. Nuñez) We don't list every single
9 document that we received. As you can imagine, the
10 production is extensive. We have access to all the
11 production, if that's what you're asking.

12 Q. Approximately how many drafts of each of
13 your Reports did you exchange with Perú's lawyers
14 before producing the final product?

15 MR. SMYTH: Objection. That's trying to
16 illicit privileged information.

17 MS. HORMAZABAL: We are trying to establish
18 independence as to assess how much of an influence
19 Perú's counsel--

20 MR. SMYTH: I think all of us know--

21 MS. HORMAZABAL: I don't need to know the
22 content.

1 MR. SMYTH: If I could just address that,
2 that comment, I think all of us in this room know that
3 an expert report will go through certain drafts in the
4 process of finalizing the documents, and we submit
5 this line of questioning is both privileged and
6 irrelevant.

7 MS. HORMAZABAL: Thank you. I just wanted
8 to know how many. Ballpark is fine.

9 MR. SMYTH: Are you asking me?

10 MS. HORMAZABAL: You were answering, but
11 I'll go ahead and refer the questions to the Experts.

12 PRESIDENT McRAE: Ma'am, I'm not sure when
13 you get to the level of detail of how many, you're
14 getting close to the solicitor-client privilege. When
15 you ask if it was exchanged, as it was admitted, as I
16 think by Mr. Smyth, that's fine, but the detail--

17 BY MS. HORMAZABAL:

18 Q. More than one draft?

19 MR. SMYTH: We would object to the question.

20 PRESIDENT McRAE: It's the same question.
21 Clearly they exchanged. That is, as Mr. Smyth said,
22 well-known that this happens when experts submit

1 reports but the number--

2 MS. HORMAZABAL: Thank you for answering,
3 Mr. Smyth.

4 BY MS. HORMAZABAL:

5 Q. Were you asked by Perú's lawyers to modify
6 certain opinions after providing them with drafts of
7 your Report?

8 A. (Mr. Nuñez) No.

9 Q. Then why multiple drafts?

10 I will move on.

11 A. (Mr. Nuñez) I'm sorry, I don't understand
12 the question. Why multiple drafts?

13 PRESIDENT McRAE: There was no question.

14 MS. HORMAZABAL: Okay.

15 BY MS. HORMAZABAL:

16 Q. I will move on to my next line of questions.

17 Did you conduct any specific analysis, but
18 for or otherwise, in which you were able to
19 demonstrate that the reasons stated in Paragraph 21 of
20 your First Report were the cause of the revenue loss,
21 what analysis did you do?

22 A. (Mr. Chodorow) We looked at the data and

1 information that was available. We looked at the--we
2 looked at the patterns related to when Suppliers
3 disappeared in I think it was either C-30 or C-43--I
4 can't remember which Exhibit it was--to see if there
5 was anything clear there. We looked at the
6 allegations that were made with respect to the loss of
7 Suppliers and the loss of bank accounts that were in
8 the Claimant's Memorial. And as I noted during the
9 presentation, we found evidence that directly
10 contradicted a number of those claims.

11 We looked--we would have looked at the
12 Document Production. There was a request seeking all
13 information relating to communications with Suppliers
14 that were terminating their relationships with KML,
15 and I believe that that document request said there
16 were no such documents available.

17 And so, the information that's available to
18 try and prove this theory is simply not there, which
19 is why we think the causal link is speculative,
20 particularly given that a number of the facts that
21 were stated relating to either Suppliers that
22 purportedly stopped selling after a certain date, but,

1 in fact, continued to sell--or that there were--there
2 was significant Supplier turnover caused by the
3 Measures when, in fact, our analysis of the Supplier
4 retention rates shows no significant change over time
5 as a result of the Measures.

6 Q. Thank you.

7 Did you certify that these were actual
8 causes or just merely possible? The ones here in
9 Paragraph 21.

10 A. (Mr. Chodorow) So, I think we were careful--

11 Q. This is a "yes" or "no" question.

12 A. (Mr. Chodorow) I think I need to answer. I
13 think we were careful because there's lack of
14 information to confirm any specific--any specific
15 cause. There's certainly, we found, no evidence
16 whatsoever that it was specifically linked to the
17 alleged Measures.

18 We don't dispute that it's possible that
19 some effect could have come from that, but we see
20 clear evidence of other explanations that seemed very
21 plausible to us.

22 Q. How clear?

1 A. (Mr. Chodorow) We think some of it is fairly
2 clear.

3 Q. Actually clear? Can you explain?

4 A. (Mr. Chodorow) Sure.

5 I can provide specific examples, if that's
6 helpful.

7 Q. Of the causation?

8 A. (Mr. Chodorow) Yeah, of how we evaluated the
9 causation.

10 Q. Did you evaluate the causation and actually
11 come to an actual conclusion?

12 A. (Mr. Chodorow) We did, and the conclusion
13 that we came to was that there was no--no material
14 evidence outside of statements made by the fact
15 witnesses to support the claim that the Suppliers were
16 departing as a result of Perú's Measures, and there
17 were significant other plausible explanations for what
18 was happening. But we cannot receive a firm
19 conclusion because we didn't have access to all the
20 data that it sounds like Mr. Smajlovic may have seen.

21 Q. I just want a clear answer. Is there a
22 causation of this, or no? Paragraph 21.

1 A. (Mr. Chodorow) As I said, I think there is
2 significant evidence to support these alternative
3 explanations, certainly far more evidence than there
4 is that it was caused by Perú's Measures, but I think
5 we're pretty clear in our opinions that we can't be
6 100 percent sure and we, you know, it's possible that
7 there was some effect of the Measures. And if there
8 was, we would have tried to disentangle that if we had
9 access to information that would allow us to do that,
10 but that was not available here.

11 Q. So, you're fairly certain of this but not
12 the other documents Claimant has provided in this
13 Arbitration, other causation. You seem to be very
14 sure about this but not the other causation that we
15 have provided in this Arbitration.

16 (Overlapping speakers.)

17 A. (Mr. Chodorow) As I said, we can evaluate
18 the causal link to the extent possible using
19 information that is available to us. And we've tried
20 to do that, the information is necessarily incomplete
21 because there were many documents that--that we would
22 have been interested in seeing from KML that were not

1 present, and so we couldn't--we certainly couldn't
2 conclude that it was caused by the Measures because
3 the documents don't show that because there don't seem
4 to be any documents.

5 These other explanations are factors that,
6 to us, raised significant doubt as to the alleged
7 causal link and, we think, provide plausible
8 explanations for what may have been happening.

9 Q. Did you confirm causation was as a result of
10 Paragraph 21, or not?

11 A. (Mr. Chodorow) We--as I said, we could not
12 confirm causation.

13 Q. Thank you.

14 In Paragraphs 21, 65 through 66, and
15 Figure 4 of your First Report, you make the following
16 statements: "KML's volumes were already declining in
17 late 2013, and KML's purchases began declining before
18 the Measures began, referring to the alleged decline
19 in volumes." Please confirm that this statement is
20 based on your assessment of the last two months of
21 2013. Is that correct?

22 A. (Mr. Chodorow) That's correct. That was the

1 only data that was available.

2 Q. Have you done any analysis of the market in
3 which you clearly saw that the market trends of the
4 competitors suggested higher purchases or higher
5 volumes in those last two months?

6 A. (Mr. Chodorow) Sorry?

7 Q. Of the year.

8 A. (Mr. Chodorow) Are you talking--I apologize.
9 Can you ask that question again? I don't think I
10 understood it.

11 Q. Have you conducted any analysis of the
12 market in which you clearly saw that the market trends
13 of the competitors suggested higher purchases or
14 higher volumes in those last two months of the year?

15 A. (Mr. Chodorow) No, but it's a--

16 Q. Thank you.

17 A. --market where that data is not available
18 for us to evaluate.

19 Q. Thank you.

20 In other words--so, you did not analyze what
21 the situation was with competitors during those last
22 few months; correct?

1 A. (Mr. Chodorow) That's correct. We didn't
2 have the data, but looking at this graph, it's very
3 clear that, in order to reach a conclusion on this
4 causal link, one would have to explain what happened
5 between October and November.

6 Q. That wasn't my question.

7 If you didn't conduct any analysis, how can
8 you then consider this seasonal decline as permanent?

9 A. (Mr. Chodorow) I don't think I agree with
10 your premise that this is a seasonal decline. As I
11 mentioned, we looked at the monthly data--

12 Q. Is it permanent?

13 A. (Mr. Chodorow) Can I finish my answer?

14 Q. Sure, please.

15 A. (Mr. Chodorow) So, we looked at the data, it
16 was up on the screen earlier today--there was monthly
17 data on Peruvian gold volumes. And while it's true
18 that this is the end of the year and theoretically
19 there could be seasonal effects, we looked at other
20 years, and you can see in other years, there doesn't
21 appear to be a seasonal effect. So, there's not a
22 clear trend here.

1 And also, I think Mr. Smajlovic talked about
2 this idea that the holidays started in December. So,
3 if that's the case, that wouldn't explain what was
4 happening in November.

5 Q. Is there a reason to conclude that this
6 decline would be permanent?

7 A. (Mr. Chodorow) We don't have the data to
8 evaluate that, which is the problem with the causal
9 link.

10 Q. Thank you.

11 Is it not more prudent to analyze the
12 purchases of a year as a whole or determine a trend or
13 to average for such seasonal shifts and looking solely
14 at two individual months?

15 A. (Mr. Chodorow) So, I think there are a few
16 problems. The first is that, in theory, it could be
17 reasonable to look at seasonal trends, but here we're
18 talking about a history of 15 months, and so, you
19 can't discern any kind of seasonal trends with such
20 limited data.

21 The second is these volumes are clearly very
22 volatile from month to month, and we know that in that

1 October--sorry, in the August to October period, those
2 volumes were coming to a great extent from the Chamy
3 family Suppliers, which we understand disappeared, and
4 so you can't just assume, okay, they achieved this
5 volume by buying mostly from a small affiliated group
6 of producers--sorry, not producers because my
7 understanding is they weren't producers, but
8 Suppliers, and then assume that after those Suppliers
9 disappear, nonetheless, KML would receive those
10 volumes in future years.

11 Q. Do you know if the output of Perú, as a
12 whole, for gold declined in 2014.

13 A. (Mr. Chodorow) I would have to go back and
14 look at the data. I know that the artisanal volume
15 shrunk significantly, but I don't remember the amounts
16 for the total. I would be happy to take you to that
17 place in our Report, if that's helpful.

18 Q. Thank you.

19 We're going to pull up [REDACTED] Witness
20 Statement, the First.

21 In your presentation today, you stated that
22 [REDACTED] in your presentation today, you stated

1 that Mr. [REDACTED] said that he had disrupted the
2 market; correct?

3 A. (Mr. Nuñez) Yes, that's what we said.

4 Q. Is this not a mischaracterization of his
5 words? If you could please read them.

6 A. (Mr. Nuñez) Do you want me to read it out
7 loud?

8 Q. Yes, please.

9 A. (Mr. Nuñez) "Prior to KML entering the
10 Peruvian gold market, existing Buyers controlled such
11 market and dictated the price of gold; but I was
12 effectively able to disrupt their strategy."

13 Q. Did he say "market" or "strategy"?

14 A. (Mr. Nuñez) It says "strategy," but--

15 Q. Thank you.

16 A. (Mr. Nuñez) Would you let me finish--

17 MR. SMYTH: Excuse me, once again--

18 MS. HORMAZABAL: They can expand on your--

19 MR. SMYTH: May I speak?

20 Once again, the Claimant's counsel has
21 interrupted the Expert while they're making an answer.
22 It's clear that the experts are providing concise

1 answers to questions, so we submit that they should be
2 allowed to make those answers.

3 MS. HORMAZABAL: This was a simple answer,
4 and he already provided it. He can expand during
5 Respondent's recross--redirect.

6 PRESIDENT McRAE: As a general comment, I
7 understand your point, but I think you picked the
8 wrong example because you asked whether he said
9 "market" or "strategy," and he said "strategy," and so
10 there's no need to elaborate at that point.

11 MS. HORMAZABAL: Thank you.

12 BY MS. HORMAZABAL:

13 Q. In your PowerPoint presentation, you also
14 mentioned NTR.

15 A. (Mr. Nuñez) Yes.

16 Q. And I see that you cited your own report for
17 that portion of your presentation; is that correct?

18 A. (Mr. Nuñez) Yes, that's probably where we
19 cited it, yeah.

20 Q. Did this come from an unverified news or an
21 unverified article?

22 A. (Mr. Nuñez) I don't know what you mean by

1 "unverified." You will have to show me the--

2 Q. Have you ever spoken to the writer? Do you
3 know who the writer interviewed?

4 A. No.

5 Q. Did it come from any financial documents
6 where you reviewed about NTR?

7 A. (Mr. Nuñez) Would you mind putting the
8 article in front of me? Otherwise, I cannot comment
9 on any content, if you don't show me the article.

10 Q. I can provided with your own PowerPoint.

11 A. (Mr. Nuñez) No, I understand my PowerPoint
12 cites to that, but if you could put in front of me
13 the--

14 Q. You don't recall your own exhibit?

15 A. (Mr. Nuñez) I don't recall every single
16 exhibit.

17 Q. But you do recall where you mention--

18 (Overlapping speakers.)

19 A. (Mr. Nuñez) I--

20 Q. --NTR; correct?

21 A. (Mr. Nuñez) I absolutely recall NTR, yes.

22 Q. Please go to Brattle II, Paragraphs 115

1 through 117?

2 A. (Mr. Nuñez) Let me make a point before you
3 answer the question. This is a causal link that
4 Mr. Chodorow--

5 Q. You answered first, if you would like to.

6 A. (Mr. Nuñez) No, we mentioned NTR in our
7 presentation several times in different contexts. If
8 you're asking me about--

9 Q. Did you ever review NTR's Financial
10 Statements?

11 A. (Mr. Chodorow) We don't have access to them.

12 Q. Did you ever review whether NTR's margins
13 were lower than KML's?

14 A. (Mr. Chodorow) We don't have access to them,
15 so we couldn't.

16 Q. Where did you receive this information from?

17 A. (Mr. Chodorow) I said we couldn't because we
18 don't have that information.

19 Q. Okay. Whether I say "unverified article,"
20 is it signed by anyone?

21 A. It was published by somebody, and it cited
22 to an interview of somebody who was from NTR, I

1 believe.

2 Q. Did it cite to an interview?

3 A. (Mr. Chodorow) I believe that it was--it was
4 referring to a statement made by an NTR employee.

5 Q. You can see here, Paragraph 116, Brattle
6 uses an article, any article, to discuss a competition
7 and how a company may have increased their price in a
8 purchase. But once again, this wasn't a document you
9 reviewed from any Financial Statements from NTR?

10 A. (Mr. Chodorow) Correct.

11 But I will note that it's a basic economic
12 theory that, if somebody comes into a market and
13 starts raising the price that they're sourcing for
14 gold, it wouldn't be at all surprising that the
15 Suppliers who had their strategy disrupted, as
16 [REDACTED] said, would respond by raising their
17 prices. So, we can't confirm everything about this
18 statement other than that it was discussed as I
19 believe a quote from the Article, but it's certainly
20 consistent with what one would expect from an economic
21 perspective.

22 Q. So, here in your Report you're saying that

1 it was good to gain Market Share from [REDACTED]
2 Is that what you're alleging here? It says it on your
3 Report. You don't have to...

4 A. (Mr. Chodorow) I apologize. Are you
5 asking--could you ask the question again? I think I
6 didn't understand.

7 Q. Do you consider obtaining Market Share from
8 Mr. [REDACTED] was good? You read this in an article.
9 I'm just trying to understand.

10 A. (Mr. Chodorow) There seemed to be a lot of
11 allegations about him. Certainly, NTR viewed it as
12 good. My understanding is that, on the article, that
13 he was deeming back share from--that [REDACTED] had
14 taken, so presumably they both thought having volumes
15 from Mr. [REDACTED] was good.

16 Q. That's a mischaracterization. That was
17 never said in this arbitration.

18 A. (Mr. Chodorow) But I think that's what the
19 article says.

20 Q. [REDACTED] never said he bought from
21 Mr. [REDACTED]. It's a mischaracterization. Once again,
22 you're repeating an article that's not verified.

1 A. (Mr. Chodorow) We cite to it.

2 Q. And you're using it as an example.

3 If you reached out to the writer and you
4 conducted extensive analysis, I would love to see it,
5 if you can provide it.

6 A. (Mr. Chodorow) We did not.

7 MR. SMYTH: Is there a question there, just
8 to clarify?

9 PRESIDENT McRAE: I think he's answered that
10 he's relied on the article and not anything else.
11 That's all he's relying on is the article.

12 MS. HORMAZABAL: Okay. Thank you.

13 BY MS. HORMAZABAL:

14 Q. In my next line of questioning, please show
15 Paragraphs 27 and 109 of your First Report.

16 Here, you indicated that the gold-trading
17 business is easy to replicate, there are no material
18 barriers to entry, to protect KML from competition,
19 and KML's existing competitors would act to prevent
20 KML from capturing virtually the entire market, and
21 the only source that you have or actual proof comes
22 from the news article that you--that we've previously

1 discussed; correct?

2 A. (Mr. Chodorow) Can you point me to where
3 you're referring to? This is a long paragraph.

4 Q. It says it right there. If you would like,
5 you can go ahead and read it out loud.

6 A. (Mr. Chodorow) "KML has no material
7 competitive advantage, there are no material barriers
8 to entry to protect KML from competition, and KML's
9 existing competitors would act to prevent KML from
10 capturing virtually the entire market."

11 That said, this is a summary of information
12 that is discussed and broken down elsewhere in our
13 Report.

14 Q. Okay. Where is the basis of--or the support
15 for this assertion?

16 A. (Mr. Chodorow) Could you take me to the
17 Table of Contents?

18 So, it should be in the section about the
19 economic laws of competition. It should be--it's
20 probably touched upon in the section about Perú's
21 Market Share being unreasonable. And there may be
22 other places where we talk about the detail underlying

1 those opinions.

2 Q. Do you recall any of the sources you used?

3 A. (Mr. Chodorow) Not offhand.

4 Q. Were they similar to the one you used to
5 discuss NTR?

6 A. (Mr. Chodorow) You can take me to them and
7 we can talk about each of the cites, but as we are
8 sitting here, I don't remember every item that we
9 cited.

10 Q. Have you reviewed any financial documents of
11 other companies that could allow you to conduct an
12 extensive analysis and come to this conclusion?

13 A. (Mr. Chodorow) As I mentioned, it's an
14 opaque market, and we don't have access to much in the
15 way of Financial Statements.

16 Q. Thank you.

17 Would you agree that having a large and
18 captive demand is a competitive advantage?

19 A. (Mr. Nuñez) Yeah, I would agree with that.

20 Q. Thank you.

21 If I can take you to 136 of your First
22 Report.

1 Here you have accused Mr. Smajlovic's
2 assumption of a 0.1 Profit Margin as demonstrably
3 excessive; is that correct?

4 A. (Mr. Nuñez) We don't accuse him of anything.
5 We just look at his analysis and make a conclusion,
6 yeah.

7 Q. Okay. You state that his assumed .1 percent
8 profit on fixing is demonstratively excessive?

9 A. (Mr. Nuñez) Yes, that's what it says.

10 Q. So, Mr. Smajlovic has applied a .1 percent
11 Profit Margin, and the .1 percent of the total
12 proceeds is then--this is .1 percent out of
13 100--right?--is then being used to pay off all
14 operating, financing and administrative charges, tax,
15 et cetera; is that correct?

16 A. (Mr. Nuñez) No, that's not correct, at least
17 not in Mr. Smajlovic's DCF.

18 Q. If you could please--

19 A. (Mr. Nuñez) Of course, I can elaborate.

20 This is one of the revenue items that he
21 had--that KML purportedly had. There's others.

22 Q. Which one was the largest?

1 A. (Mr. Nuñez) I don't remember exactly.

2 Q. Do you remember what the other ones were?

3 Or any other--

4 A. (Mr. Nuñez) There is revenue in scrap gold,
5 there's some interest charges. Those are two. If I
6 remember--not I don't remember--if I recall correctly
7 that .1, the total margin is something like .3 is the
8 total profitability of what Mr. Smajlovic has in his
9 analysis.

10 Q. So, his analysis is actually conservative.

11 A. (Mr. Nuñez) I don't agree with that.

12 Q. Okay.

13 A. (Mr. Nuñez) I don't know how the
14 relationship between .1 and .3 that is in his
15 analysis. All I'm saying is that .1 percent is one
16 line item in his income. There's other sources of
17 revenue in his DCF analysis: We were able to analyze
18 this in particular and show that it's excessive.

19 Q. So, from my review of Paragraph 137, despite
20 using a .1 percent, you are stating that he is being
21 aggressive here?

22 A. (Mr. Nuñez) Yes, and the reason is because

1 .1 percent or .3 percent are the very small margins or
2 thin margins are applied, and Mr. Smajlovic actually
3 says that today. These are large volumes, and all it
4 takes is to flip it a little bit and you change
5 damages significantly.

6 And actually, in 137, we explain how that
7 small changes in his margin can reduce or impact
8 damages a significant amount.

9 Q. You heard Mr. Smajlovic today state that, if
10 it was a .5 percent, the business would not be viable.
11 Do you agree with that statement?

12 A. (Mr. Nuñez) I don't know. I don't know what
13 information Mr. Smajlovic had to make that--

14 Q. You have not conduct that analysis; is that
15 correct?

16 A. (Mr. Nuñez) I haven't--I haven't--we haven't
17 done the analysis that led Mr. Smajlovic to conclude
18 that that particular--I don't know where he sources
19 that opinion.

20 Q. Does it sound unreasonable?

21 A. (Mr. Nuñez) I'm not going to speculate.

22 Q. Well, four-and-a-half years have passed

1 since KML exited the Peruvian market; is that correct?

2 A. (Mr. Chodorow) Approximately, yes.

3 Q. Who seized KML's Market Share?

4 A. (Mr. Chodorow) We don't know.

5 Q. Do you know who is offering better terms
6 today?

7 A. (Mr. Chodorow) As I mentioned, it's an
8 opaque market that we can't see, but there are many
9 incumbents.

10 Q. So, again, you have done none--no
11 independent research in this regard?

12 A. (Mr. Chodorow) That's correct, but that's
13 the fundamental problem with trying to estimate
14 damages in this case, is that the data that's
15 necessary to perform these kinds of analysis that we
16 would want to do to estimate damages reliably, is not
17 available. It's not available from the documents
18 produced by KML, and it's not available by conducting
19 our own independent research because the data is just
20 not publicly available in most cases.

21 Q. So, you did not do the analysis; is that
22 correct?

1 A. (Mr. Chodorow) We didn't do the analysis
2 because there's no available data. So, the analysis
3 would be speculative.

4 Q. Okay. I'm asking because you're the one who
5 presented these assertions. But thank you.

6 PRESIDENT McRAE: Ms. Hormazabal, we're
7 close to where we normally take a break, if you are
8 going to start a new topic.

9 MS. HORMAZABAL: We can take a break.

10 PRESIDENT McRAE: Short break? 10 minutes.

11 Okay, a ten-minute break. I have to say to
12 the two experts that you're unable to contact the
13 Respondent's lawyers during this period of time and
14 you are isolated during the break.

15 THE WITNESS: (Mr. Nuñez) Mr. President, are
16 we allowed to speak to each other?

17 PRESIDENT McRAE: Yes.

18 (Recess.)

19 PRESIDENT McRAE: Ms. Hormazabal, whenever
20 you're ready.

21 MS. HORMAZABAL: Thank you.

22 BY MS. HORMAZABAL:

1 Q. Are you both ready?

2 A. (Mr. Nuñez) Yes.

3 Q. Going back to the 0.1 percent, where you
4 have alleged it to be aggressive or excessive in your
5 Report, are you basing your answer on the actual world
6 or in the but-for scenario?

7 A. (Mr. Nuñez) It's both. I think I showed a
8 figure today that replicates figures from our Reports,
9 and you see it's before and after the Measures.

10 Q. So, was it based off of the actual world,
11 the historical values that KML has presented after the
12 Measures?

13 Did it ever achieve 0.1 percent?

14 A. (Mr. Nuñez) The point is that they were
15 volatile; that's the point I was trying to make, yes.

16 Q. Based on the actual world, they were
17 volatile?

18 A. (Mr. Nuñez) Yes.

19 Q. Thank you.

20 We will go on to the next subject. If you
21 could please turn to Paragraph 171 of Brattle's First
22 Report.

1 Were you informed, or did you receive any
2 documentation that stated, that KML never filed a tax
3 return in 2018 because it had not begun operations
4 that year? [REDACTED].

5 A. (Mr. Chodorow) Yes, we did see that
6 document, although we understand--I think there was
7 witness testimony that somebody was working for [REDACTED]
8 [REDACTED] in, I think, December 2018, if I remember
9 correctly.

10 Q. I'm asking about actual operations and
11 income.

12 A. (Mr. Chodorow) I understand there was no tax
13 return filed until 2019.

14 Q. Since you're aware of what happened in these
15 hearings, are you also aware that [REDACTED] did
16 not purchase any gold from Peruvian Suppliers?

17 A. (Mr. Chodorow) Yes. I believe [REDACTED]
18 stated that in his Witness Statement.

19 Q. Is it your position that [REDACTED]
20 should be taken into account for purposes of damages?

21 A. (Mr. Chodorow) I think it has important
22 implications, so yes.

1 Q. Are you aware that it has been established
2 on the record that [REDACTED] did not purchase
3 any gold from inside Perú?

4 A. (Mr. Chodorow) Yes.

5 Q. Are you also aware that [REDACTED] does
6 not sell to [REDACTED] and does not have similar business
7 relationship with [REDACTED]?

8 A. (Mr. Chodorow) I heard that, I believe, when
9 [REDACTED] was testifying.

10 Q. However, it is your position that KML should
11 not receive damages related to countries outside of
12 Perú; is that correct?

13 A. (Mr. Chodorow) That was a legal instruction.
14 I believe we were clear about that in our Report.

15 Q. So, is that what you--your proposed
16 calculations--is that what your proposed calculations
17 reflect?

18 A. (Mr. Chodorow) It reflects both that
19 instruction; and, I think as we were pretty clear in
20 our Report, we considered the volumes that were
21 projected outside of Perú to be entirely speculative.

22 If you look at the trend, the growth from

1 2012 to 2013, as we present in our Report, outside of
2 Perú, was, I think, about 11 percent. And, in the
3 following year, Mr. Smajlovic forecast that the volume
4 outside of Perú would grow at, I think it was, 60 or
5 70 percent--I would have to go back and look--and that
6 there was basically no analysis whatsoever of
7 who--what markets it would come from. There was no
8 analysis of the competition in those markets, the
9 available reserves and whether KML could access them.

10 And so, without any kind of analysis, we
11 think it's speculative to forecast volumes outside of
12 Perú.

13 There is one single assumption that drives
14 all of the damages outside of Perú; and, as
15 Mr. Smajlovic said earlier today, it was that he
16 assumes that the ratio of 53 to 47 percent for
17 purchases outside Perú and inside Perú would hold
18 through 2048.

19 Q. Thank you.

20 I don't want to cut you off because I have
21 been asked to let you proceed, but that wasn't my
22 question.

1 So, in your calculations, you do not reflect
2 any damages from outside of Perú; is that correct?

3 A. (Mr. Chodorow) That's correct.

4 Q. And, as you heard here, [REDACTED] did
5 not purchase from inside of Perú; is that correct?

6 A. (Mr. Chodorow) Correct.

7 Q. So, following those two premises, wouldn't
8 you consider this position contradictory, to want to
9 take into account [REDACTED] for purposes of
10 damages?

11 A. (Mr. Chodorow) I think you're
12 misunderstanding the purpose of this. We're not
13 saying all of the damages were certainly made up by
14 [REDACTED]. We're saying perhaps it's a
15 consideration. What we've said is there was a legal
16 instruction that we followed, but we also suggest--we
17 also analyzed the only limited data available, and it
18 didn't support any kind of reasonable forecast for
19 volumes outside these countries.

20 Q. Okay. That wasn't my question.

21 Again, why would you diminish or subtract
22 from damages based on [REDACTED], if [REDACTED]

1 [REDACTED] did not have operations and did not purchase
2 from Perú, where your legal instructions are to only
3 include Peruvian-related volumes?

4 A. (Mr. Chodorow) So, to be clear, if you turn
5 to this slide in our analysis, we--thank you. Mine
6 are very out of order.

7 We described the eight adjustments that we
8 make, and one of those adjustments--this is on slide--

9 Q. Could you please provide us the Slide
10 Number.

11 A. (Mr. Chodorow) Sorry. Slide 31.

12 Q. Please proceed.

13 A. (Mr. Chodorow) Okay.

14 So, you will see, if you walk down the
15 slide, we are making eight corrections to
16 Mr. Smajlovic's analysis. None of those corrections
17 is a deduction related to [REDACTED]. We are
18 simply highlighting a few different things with
19 respect to [REDACTED] that I think are important
20 from a conceptual perspective to consider in valuing--

21 Q. I'm sorry, but you haven't answered my
22 question. Could you say "yes" or "no," that you have

1 taken [REDACTED] an into account regarding your
2 damages calculation?

3 A. (Mr. Chodorow) It's not specifically
4 adjusted for here, as I said.

5 Q. Okay. What was your proposition, then?

6 A. (Mr. Chodorow) So, we have a few different
7 propositions. The first is that [REDACTED]
8 provides evidence that the barriers to entry are low,
9 and the reason it does that is because [REDACTED]
10 closed KML and then was quickly back in business with
11 [REDACTED]. It sounds like he didn't have the
12 backing of [REDACTED], which we hadn't heard before, but
13 that's--that makes this point even stronger, and he
14 was able to get back in and start a brand-new business
15 in which he was able to start buying gold, and so it's
16 consistent with our discussion that there are no
17 material barriers to entry for the business, along
18 with the other statements that we noted from
19 [REDACTED] confirming that.

20 Q. Should [REDACTED] be taken into account
21 for damages? "Yes" or "no."

22 A. (Mr. Chodorow) I think it should be a

1 consideration, but we don't make a specific adjustment
2 for it.

3 Q. But, here in your presentation, you say
4 "no," you haven't provided for this. That's what you
5 just represented to me; is that correct?

6 A. (Mr. Chodorow) That's correct. We did not
7 make a specific adjustment.

8 Q. Thank you.

9 Let's go to Paragraph 183 of your First
10 Report. Based on Paragraph 183 of your First Report,
11 you state that Mr. Smajlovic's use of the Market
12 Approach for reasonableness check only was an
13 inherently speculative method; is that correct?

14 A. (Mr. Nuñez) Yes, that's correct.

15 Q. And here today, you also represented that
16 you also used the Market Approach to do your own
17 reasonableness check; is that not correct? "Yes" or
18 "no."

19 A. (Mr. Nuñez) Again, you have to let me
20 answer. A "yes" or "no" question doesn't apply here.
21 Please, can I finish my answer?

22 Q. Proceed.

1 A. (Mr. Nuñez) Speculative in this context is
2 the application of ALS and the way that he implements
3 the method. We would never say that, as a general
4 matter, the comparable method is speculative.

5 Q. Are you aware that Mr. Smajlovic has stated
6 that he was unable to identify comparable companies
7 that could be used in determination of damages to KML?

8 A. (Mr. Nuñez) Yeah, I think I remember he says
9 that.

10 Q. Do you agree with this assertion?

11 A. (Mr. Nuñez) I think so, yes, we agree.

12 Q. Is 2012 the only real but-for world year
13 without Measures?

14 A. (Mr. Nuñez) Full year, correct, yeah. The
15 alleged Measures, if I remember correctly, is 27
16 November 2013, so by that measure or
17 criteria--criterion, yeah, 2013 is contaminated by the
18 Measures.

19 Q. Does Secretariat use Market Approach--"yes"
20 or "no"--to take into consideration for his but-for
21 calculations?

22 A. (Mr. Nuñez) It doesn't--his damages estimate

1 is not based on the Market Approach. He tests it with
2 the--with ALS.

3 Q. So, if 2012 was the only real but-for world,
4 why do you say that data after 2013 are comparable for
5 purposes of the damages?

6 A. (Mr. Nuñez) You will have to elaborate. I
7 don't know. I don't understand the question.

8 Q. Again, are you using actual world or but-for
9 world, in your analysis?

10 A. (Mr. Nuñez) In what part?

11 Q. In your calculation of damages.

12 A. (Mr. Nuñez) We used actual data because of
13 the way that Mr. Smajlovic presents damages is a
14 but-for minus actual; so, of course, the way that we
15 approach it is in the same way.

16 Q. Thank you.

17 Please turn to Claimant's Exhibit C-0143.

18 The name of this document is "Revolving Line of
19 Credit." Executed by [REDACTED] and KML in 2011; is that
20 correct?

21 Could you please read the names of the
22 executors of this Contract.

1 A. (Mr. Chodorow) [REDACTED]

2 I [REDACTED] and Kaloti Metals & Logistics
3 LLC.

4 Q. Have you seen this document before?

5 A. (Mr. Chodorow) Yes.

6 Q. In this Agreement, [REDACTED] is referred to as a
7 "lender" and KML as a "borrower"; is that correct?

8 A. (Mr. Chodorow) That's correct.

9 Q. Is KML classified as a subsidiary, a branch,
10 or a sister company? Here?

11 A. (Mr. Chodorow) I would have to read through
12 the whole document. The first sentence does not say
13 it--the first paragraph doesn't say it.

14 Q. Okay. Let's go to the "INTEREST."

15 Under Article 2--

16 MR. SMYTH: Sorry, excuse me, I think the
17 Expert was asking to be shown the whole document
18 before he could confirm the answer to the last
19 question.

20 MS. HORMAZABAL: I'm sorry. I didn't hear
21 that.

22 BY MS. HORMAZABAL:

1 Q. Is that what you asked?

2 A. (Mr. Chodorow) I just mentioned that I
3 couldn't--there was nothing in the first paragraph
4 about confirming a familial relationship. From a
5 legal perspective, I don't know if there's anything
6 else in here.

7 Q. You're free to scroll up and down, if you
8 want to read it all.

9 A. (Mr. Chodorow) I don't see anything here.

10 Q. You've also mentioned here that you've
11 reviewed it.

12 Under Article 2, the Revolving Line of
13 Credit, please confirm that for the first \$3 million
14 [REDACTED] would charge 8 percent interest, and then for
15 amounts over 3 million to \$5 million, [REDACTED] would charge
16 10 percent interest.

17 Do you see this?

18 A. (Mr. Chodorow) I do.

19 Q. In your experience, don't allegedly-related
20 parties charge--do they usually charge higher or lower
21 interest or no interest at all?

22 A. (Mr. Chodorow) I apologize, can you ask your

1 question again?

2 Q. Absolutely.

3 In your experience, do allegedly-related
4 parties charge higher or lower interest or no interest
5 at all?

6 A. (Mr. Chodorow) It varies a lot.
7 Intra-company loans usually have an interest rate
8 associated with them, and the rate depends on the
9 particular circumstances of the lender and the risk.

10 Q. Would you classify these as fair market
11 rates?

12 A. (Mr. Chodorow) I don't know what these are.
13 They're just rates that are put in. That's one of the
14 problems is oftentimes in--certainly with related
15 party--and I don't know if these are related party or
16 not--I'm not expressing an opinion--they will set a
17 rate, and I have been involved in many tax disputes
18 relating to whether that Interest Rate reflect Fair
19 Market Value or arm's-length terms or not.

20 Q. Do they sound reasonable, like reasonable
21 terms? Are they high, reasonable, or low?

22 A. (Mr. Chodorow) I would have to go back and

1 look at what Interest Rates were at the time.

2 Q. But you don't have any basis to assume that
3 they are not reasonable; is that correct?

4 A. (Mr. Chodorow) I don't have a basis to
5 assume they are not or that they are.

6 Q. Thank you.

7 Even after KML's gold inventory was seized
8 in 2013 through 2014, [REDACTED] continued to provide a
9 funding source for KML's business; is that correct?

10 A. (Mr. Chodorow) That's my understanding.

11 Q. From your review of the documents, until
12 when? Was it until November 2018?

13 A. (Mr. Chodorow) There was a letter sent in
14 November of 2018. I don't know that they stopped
15 providing any financing at that point. The letter
16 indicated that they were in--were planning to do so,
17 but I don't know if that lending continued or not.

18 Q. Thank you.

19 Is it correct to say that the alleged
20 Measures prevented KML from attaining potentially new
21 Suppliers?

22 A. (Mr. Chodorow) Sorry, is it--can you restate

1 the question one more time?

2 Q. Is it correct to say that the Measures
3 prevented KML from attaining potentially new
4 Suppliers?

5 A. (Mr. Chodorow) I would say it's possible
6 that they did, but I have seen no evidence in the
7 documents--

8 Q. Thank you.

9 A. (Mr. Chodorow) --or data supporting it.

10 Q. Is KML considered a refinery?

11 A. (Mr. Chodorow) No.

12 Q. In Paragraph 253 of your Second Report, you
13 state that the valuation of KML implied by Valcambi
14 must be interpreted as an upper bound, however,
15 Valcambi is a refinery; is that not correct?

16 A. (Mr. Nuñez) Yeah, that's exactly the point
17 of our alleged statement that you just read.

18 Q. Do refineries have more risks than what KML
19 does?

20 (Check that quote.)

21 A. (Mr. Nuñez) Not necessarily.

22 Q. If it's--they don't have more costs to

1 operate a refinery?

2 A. (Mr. Nuñez) So, the answer is yes, and
3 that's precisely what we did--the analysis, using a
4 per ton of gold to avoid the contamination of
5 different costs and different profitability margins
6 that would be reflected in between KML and the
7 refiners. But given that they have value-added
8 services and they're more profitable, they would be
9 valued more than a non-refinery simply in an area like
10 KML.

11 Q. So, your analysis, you're comparing a
12 refinery to a non-refinery; that is correct?

13 A. (Mr. Nuñez) We're clear that they're not
14 perfectly comparable and we're saying, because these
15 two companies or the Transaction involved in these two
16 companies, are for entities that have refining
17 capacity, that has more value-added services, the
18 value of those should be higher than KML.

19 Q. Thank you.

20 Did you use any ex post inputs for your own
21 calculations, for your own DCF calculations?

22 A. (Mr. Nuñez) We don't think--I don't think we

1 did.

2 Q. In 2019, maybe?

3 A. (Mr. Nuñez) Oh, yes, that's correct. It was
4 pointed out today that there was a year--2019 that we
5 should have--that was an ex post, yes. If that would
6 be--it's a fair point by Mr. Smajlovic, and that
7 should be--that should be corrected.

8 Q. Thank you.

9 In Paragraph 34 of your First Report, you
10 state--give me a few minutes.

11 (Pause.)

12 Q. "KML is a limited liability corporation," it
13 says "corporation," but it's company, "that under U.S.
14 tax laws, pays no Corporate Taxes in the U.S. As
15 such, KML would have no tax liability on any
16 compensation received." This came from both of you or
17 one of you; is that correct?

18 A. (Mr. Chodorow) Yes.

19 (Pause.)

20 Q. In Paragraph 34 of your First Report, and
21 again you state: "KML is a limited liability
22 corporation that, under U.S. tax laws, pays no

1 Corporate Taxes in the U.S. As such, KML would have
2 no tax liability on any compensation received."

3 That is correct?

4 A. (Mr. Chodorow) That's correct, but it
5 doesn't mean that the income in the U.S. would be
6 untaxed.

7 Q. It would be taxed on the member level; is
8 that correct?

9 A. (Mr. Chodorow) Correct.

10 Q. Thank you.

11 A. (Mr. Chodorow) And that's why any Valuation
12 Expert must consider that liability.

13 Q. So, you have changed your opinion in your
14 Second Report? You went from, we shouldn't consider
15 tax liability on any compensation received--this is
16 what it says here in your own report, in your Second
17 Report, it's a little different; is that correct?

18 A. (Mr. Chodorow) I don't see any inconsistency
19 in there at all, and I'm happy to explain it, if you
20 would like.

21 Q. Yes, please.

22 A. (Mr. Chodorow) So, there are a couple of

1 different things here. The first is, if I'm a
2 potential buyer considering purchasing an LLC, that
3 LLC itself will not pay taxes in the U.S. But the
4 Buyers of that LLC will have a tax burden imposed on
5 them, and so when you do the valuation, the--any
6 willing buyer is going to recognize that they're going
7 to get LLC income that is not taxed at the LLC, that
8 it's going to impose a tax burden on the owner, and so
9 they would discount the FMV to account for that tax
10 liability.

11 So, that's important here. I think what you
12 might be suggesting as a contradiction is the
13 implications of taxation on the Award, to the extent
14 that an award is taxed, it would be taxed and it's
15 received by the LLC, then one would expect that the
16 owners would pay that tax liability, but there--my
17 understanding is they're not Claimants here.

18 Q. That was going to be my subsequent question.

19 A. (Mr. Chodorow) Okay.

20 And so, you know, if that's the case, then I
21 don't--then it would seem inappropriate to gross up
22 for taxes that they may or may not pay on the Award.

1 Q. But you do want to discount taxes.

2 A. (Mr. Chodorow) Yes, because any potential
3 Buyer would. The issue here, as I've described as my
4 understanding that the owners themselves are not
5 Claimants here. And so, to the extent that there is a
6 tax burden associated with an award, I think we
7 explicitly had this as an instruction, that that was
8 not to be considered in assessing damages. But I
9 think there is a distinction between that and the idea
10 that somebody would value a company that has income
11 that is taxable without accounting for that tax, which
12 is what happens in Mr. Smajlovic's Second Report.

13 If there is a good legal argument for a
14 gross-up, then that's something that could be
15 considered. It's just my understanding that the
16 people that would be affected on any taxation of the
17 Award are not Claimants. And so, if you do a
18 gross-up, you're making--you're providing compensation
19 to people that are not Claimants.

20 Q. This was taken as an instruction from Legal
21 Counsel?

22 A. (Mr. Chodorow) The fact that the owners of

1 KML were not Claimants? I believe it was.

2 Q. And what else?

3 A. (Mr. Chodorow) I was also--I think we also
4 received an instruction that gross-up was not
5 appropriate, but this argument, as just a general
6 matter--what I'm talking about with respect to the
7 impact of the taxation burden on the Fair Market
8 Value, that is irrelevant with respect to whether
9 there is a gross-up or not. If I have an asset that's
10 going to pay me a hundred dollars, and that asset is
11 not taxed at the asset level, but me as the owner,
12 "No, I'm going to have to pay \$30 in taxes from owning
13 that asset; I'm only going to be willing to pay \$70."

14 And so that's why, even if the taxation
15 burden is not at the corporate level, anybody valuing
16 it is still going to discount--

17 Q. Thank you.

18 A. (Mr. Chodorow) --because it creates a tax
19 burden.

20 Q. My question is if it was an instruction or
21 not. "Yes" or "no." And it sounds like you answered
22 my question, the gross-up was an instruction, and

1 other relevant taxation matters were instructions from
2 counsel; is that correct?

3 A. (Mr. Chodorow) I don't think that's correct
4 at all.

5 When I'm talking about the implication of
6 taxes for a pass-through entity, that is an economic
7 opinion. That is not a tax opinion. I believe there
8 were two instructions related to taxes. One, that tax
9 gross-ups were not appropriate in this case, and--but,
10 nonetheless, even if I didn't have that instruction, I
11 would still conclude that it's appropriate to account
12 for the taxes.

13 And then, the other was that the Claimants
14 themselves, they're not eligible to receive
15 compensation.

16 Q. Thank you. So, you did receive an
17 instruction?

18 A. (Mr. Chodorow) On those points, yes.

19 Q. Can you confirm to this Tribunal today
20 whether KML should have paid but did not pay taxes in
21 Perú? Income Taxes in Perú, by KML?

22 A. (Mr. Chodorow) I'm not a Peruvian tax

1 expert. I saw Mr. Smajlovic's reference to the PwC
2 Country Tax Guide, which seems--and I would suggest
3 taxes should be paid there, and that seems quite
4 plausible to me.

5 Q. But your answer is you don't know.

6 A. (Mr. Chodorow) But I'm not an expert.

7 Correct.

8 Q. Thank you.

9 Let me ask you a question, and I know one of
10 you has worked with the IRS. I don't remember who?

11 A. (Mr. Chodorow) That's me.

12 Q. Okay. When a company has more expenses than
13 revenues in the country in which they work in, do they
14 pay taxes, Income Taxes once again?

15 A. (Mr. Chodorow) Once again, as a high level
16 matter, no, but tax laws are complicated.

17 Q. Thank you. That's all.

18 A. (Mr. Chodorow) I would note, that if we're
19 talking about the actual world, there may be no
20 profits to tax in Perú. But in the but-for world
21 where KML is very successful, I find it very hard to
22 believe--

1 Q. Thank you.

2 A. (Mr. Chodorow) --that under transfer pricing
3 rules there wouldn't be an obligation to pay Peruvian
4 taxes.

5 Q. Thank you.

6 In your First Report, Paragraph 236, you
7 indicated your views that November 30, 2018, the
8 Valuation Date is arbitrary, unsupported, and
9 inconsistent with the evidence; is that correct?

10 A. (Mr. Chodorow) That is correct.

11 Q. Claimant's Expert, Mr. Smajlovic, considers
12 KML to be a going-concern business up to 2018. So, do
13 you agree with his position regarding KML's treatment?
14 "Yes" or "no."

15 A. (Mr. Chodorow) I didn't agree with his
16 statement because it was--I believe it was premised on
17 the assumption that the gold inventories were written
18 off. And when we looked at the Balance Sheet, that
19 did not appear to be the case.

20 Q. So, you have no position on this?

21 A. (Mr. Chodorow) Well, we do have a position,
22 and the position is set forth in this section of our

1 Report.

2 Q. What, in your opinion, is the correct
3 Valuation Date?

4 A. (Mr. Chodorow) I think it's very hard to
5 determine in this case.

6 Q. So, you have no position in this?

7 A. (Mr. Chodorow) Our position is that
8 selecting any specific date feels quite arbitrary.

9 Q. You know what you allege is not, but you do
10 not know what it is? Is that what you're telling me?

11 A. (Mr. Chodorow) I'm saying that the premise
12 upon which Mr. Smajlovic reached the conclusion in his
13 First Report that this was the appropriate Valuation
14 Date, didn't seem to be supported by the Financial
15 Statements.

16 Q. Did you see any evidence in those financials
17 to support a different date? You just mentioned that
18 it's due to the financials, then--

19 A. (Mr. Chodorow) As we explained, there was
20 Mr. Smajlovic cites to the decision about when
21 inventories were written off as the basis for when KML
22 became insolvent. And, in this Report, we're not

1 expressing an opinion on when that should have been
2 done. We are simply noting that the Financial
3 Statements do not show any such write-off, and that,
4 in theory, at any point in time from, I don't remember
5 the start, but sometime around 2014 and beyond, one
6 could reasonably conclude that the Company was
7 insolvent. And the factors that go into that are just
8 depending upon if and when the inventories should have
9 been written off, and that's something we didn't reach
10 an explicit opinion on. We only know that the Balance
11 Sheet does not show them having been written off.

12 Q. Once again, you have no position on what the
13 correct Valuation Date is?

14 A. (Mr. Chodorow) That's correct.

15 Q. Thank you.

16 In your view, the inventory could have been
17 written off at any time prior to November 30, 2018,
18 and after the seizure of the inventory in 2014; is
19 that correct?

20 A. (Mr. Chodorow) So, we don't reach an opinion
21 about when the inventory could have been written off.
22 I think that's specific to the facts and

1 circumstances. We're just saying, if it had been at
2 any point in time from 2014 forward, the Company would
3 have been insolvent.

4 Q. Did you in any of your Reports provide an
5 assessment of the likelihood of KML recovering the
6 inventory?

7 A. (Mr. Chodorow) We did not.

8 Q. Mr. Chodorow, you indicated that you did not
9 review documents confirming the insolvency of KML
10 between 2014 and November 30, 2018; is that correct?

11 A. (Mr. Chodorow) Sorry, where are you
12 referring to?

13 Q. You indicated that you did not review
14 documents confirming the insolvency of KML between
15 2014 and November 30, 2018; is that correct?

16 A. (Mr. Chodorow) So, I think that we have seen
17 no documents confirming insolvency. And even the
18 Balance Sheet as of December 2018 didn't seem to show
19 any write-off of the inventories.

20 Q. But you allege that it should have been
21 written off in 2014 or what is your position?

22 A. (Mr. Chodorow) No, I don't think we ever

1 said that. I think we said--I think we simply said
2 that this issue of the insolvency being caused by the
3 write-offs was arbitrary because we didn't see any
4 basis to conclude that the inventories were ever
5 actually written off. But if they had been written
6 off at any earlier date, there would have been an
7 insolvency as of that date.

8 Q. Am I correct in saying that you take a lot
9 of positions of what is incorrect but you don't
10 suggest what is correct?

11 A. (Mr. Chodorow) We express our opinion as to
12 things that are wrong, that's true, and we explain
13 that, based off of the information we have seen, we
14 can't reach a specific opinion, and this applies
15 equally here to other things where there is just
16 simply no data to conduct the analysis, and so there
17 seems to be a speculative nature to some of this.

18 Q. Will you agree with me that the solvency of
19 a company means that it is unable to fulfill its
20 financial obligations?

21 A. (Mr. Chodorow) There are multiple
22 definitions. That can be one of them.

1 Q. Yeah, sure. Please.

2 A. (Mr. Chodorow) Sorry?

3 Q. Would you like to read one of them? Is that
4 what I heard?

5 A. (Mr. Chodorow) No, no. I said that what you
6 gave as an example can be--can be an instance of
7 insolvency, that there are multiple definitions.

8 Q. Thank you.

9 So, one of the definitions, would it be
10 insolvency is the ability of a company to meet its
11 long-term debts and financial obligations?

12 A. (Mr. Chodorow) That seems like a reasonable
13 one.

14 Q. Thank you.

15 Would you agree with me that a business
16 could fulfill its long-term obligations by generating
17 profits? Is that correct?

18 A. (Mr. Chodorow) Yes.

19 Q. Obtaining additional financing through
20 equity; is that correct?

21 A. (Mr. Chodorow) Yes.

22 Q. Obtaining additional financing of debt or

1 refinancing its existing debt; is that correct?

2 A. (Mr. Chodorow) I would say so, yes.

3 Q. Did you provide an opinion on KML's ability
4 to raise equity financing from its members to continue
5 operating?

6 A. (Mr. Chodorow) We didn't. We noted that
7 there was a commitment that was shown on the Balance
8 Sheet to provide financing by some of the members, but
9 that was never fulfilled.

10 Q. Did you provide an assessment of KML's to
11 raise debt either through its banking relationships or
12 through █████ in order to continue operating?

13 A. (Mr. Chodorow) We--we didn't evaluate that,
14 but it's certain--it seems pretty clear that, that at
15 least until sometime in 2018 that █████ was floating
16 them. With respect to the banks, I think
17 Mr. Smajlovic said that there was never any
18 expectation that they would be providing any kind of
19 actual funding but just, rather, the payment services.

20 Q. So, we can conclude that █████ actually funded
21 KML until 2018; is that correct?

22 A. (Mr. Chodorow) They did provide funding

1 until--until then, yes.

2 Q. Thank you.

3 Will you agree with me that, in the case of
4 KML, a part of their assessment of solvency may have
5 included the potential recovery of the seized
6 inventory between 2014 and 2018?

7 A. (Mr. Chodorow) That would be an appropriate
8 thing to consider.

9 Q. Why is that?

10 A. (Mr. Chodorow) Because that's one of the
11 factors that would go into the decision as to whether
12 to do a write-off.

13 Q. And again, you're not an accountant or a
14 CPA.

15 A. (Mr. Chodorow) No, but I know that from
16 using Financial Statements.

17 Q. If they had received the inventory in 2018,
18 would the Company have survived?

19 A. (Mr. Chodorow) I don't know.

20 Q. You looked at their numbers, you looked at
21 their financials. I'm sure you have done this
22 exercise at one point or another.

1 A. (Mr. Chodorow) So, if you're asking if
2 they'd received the inventory, would they have been
3 insolvent on--

4 Q. Would they have survived. That's what I'm
5 asking.

6 A. (Mr. Chodorow) I don't know the answer to
7 that question because there are a lot of factors aside
8 from just the receipt of the cash flow for the
9 inventory that would affect their survival.

10 Q. Would 17 million have made them solvent in
11 2018?

12 A. Can you move up for a moment?

13 So, would that have made them solvent?
14 Maybe.

15 Q. "Yes" or "no."

16 A. (Mr. Chodorow) And the reason I say that is
17 because, if, indeed, they received the 17 million and
18 if, indeed, they were obligated to pay off Shipments 3
19 and 5, they would be left with less than that, so I
20 can't quite tell that from here.

21 Q. We're looking at the same chart, are we not?

22 A. (Mr. Chodorow) Yes.

1 Q. And what does your chart say in 2018?

2 A. (Mr. Chodorow) Right here it says about
3 negative 12.5 million.

4 Q. So, you can conclude had they received the
5 17 million, they would--or even 13 million, they would
6 have been solvent?

7 A. (Mr. Chodorow) Yeah, if 13 million is
8 greater than that figure, and I think it is, then it
9 would have avoided this insolvency.

10 Q. Thank you.

11 A. (Mr. Chodorow) That's a different question
12 from the survival of the Company, which is what you
13 asked about.

14 Q. That was my question. Thank you.

15 Can we show AS-0105. And again, you have
16 seen this letter from November 14, 2018? You had
17 previously mentioned it before?

18 A. (Mr. Chodorow) That's correct.

19 Q. Here, [REDACTED] is seizing any further advances of
20 funds and is requesting an immediate settlement of its
21 outstanding credit balance; is that correct?

22 A. (Mr. Chodorow) That's what the letter says,

1 yes.

2 Q. Thank you.

3 Are you aware that KML ceased its operations
4 in 2018?

5 A. (Mr. Chodorow) Yes.

6 Q. Specifically November 2018?

7 A. (Mr. Chodorow) I don't know the exact date.
8 I know that purchasers in Perú stopped earlier in the
9 year, but I think we haven't seen monthly data to show
10 when their last purchases were.

11 Q. This was after April 30th; is that correct?

12 A. (Mr. Chodorow) Yes, the purchases in Perú
13 continued until after then.

14 Q. Thank you.

15 Is it correct to say that KML operated in
16 2014, 2015, 2016, 2017, and 2018?

17 A. (Mr. Chodorow) Yes.

18 Q. Do you agree that KML even generated profits
19 in three of these years?

20 A. (Mr. Chodorow) I would have to go back and
21 look at the Financial Statements for that.

22 Q. But do you remember?

1 A. (Mr. Chodorow) I know in some years they
2 did, and some they didn't, but I just don't remember
3 the number and which years those were.

4 Q. Is it your position that even a relatively
5 small chance that the inventories would not be
6 returned was more than sufficient to make KML
7 effectively insolvent?

8 A. (Mr. Chodorow) I think in general, yes.

9 Q. If you could please show AS--or, actually,
10 Brattle Report Paragraph 121. I'm sorry, Second
11 Report.

12 In your Report, you dispute the level of
13 capital investment required to run the business of
14 KML; is that correct?

15 A. (Mr. Nuñez) 121?

16 Q. Yes.

17 Towards the bottom, you provide an example.
18 Do you not remember this part of your Report?

19 A. (Mr. Nuñez) I'm reading the Report.

20 REALTIME STENOGRAPHER: I'm sorry, say it
21 again?

22 THE WITNESS: (Mr. Nuñez) I'm reading the

1 paragraph.

2 BY MS. HORMAZABAL:

3 Q. So, this information also came from another
4 Article; is that correct?

5 A. (Mr. Nuñez) Are you talking about the
6 footnote? And what information?

7 Q. The information where it's discussing that a
8 company could have started with only \$4,800 in
9 capital.

10 A. (Mr. Nuñez) Yes, I'm assuming you're looking
11 at 152. Could you show me the footnote, please. Let
12 me see.

13 Yep. That's--

14 Q. The same article.

15 A. (Mr. Nuñez) That's that Article, yes.

16 Q. How much debt did the Company you're
17 referring to start off with?

18 A. (Mr. Nuñez) Which company?

19 Q. In Paragraph 121, I'm sorry, you state, "for
20 example, a Company called Minerales Rivero was formed
21 with a capital of only 4,800," and you're using this
22 to state that it's easy to enter this market; is that

1 not correct?

2 A. (Mr. Nuñez) That's the purpose, to
3 illustrate that there's very little capital needed as
4 an example, barriers to Entry that you don't need a
5 lot of capital to enter this market.

6 Q. Again, how much debt did that company have?
7 Do you know?

8 A. (Mr. Nuñez) No, I don't have the financial.
9 This is a very opaque market, and I don't know. The
10 4800 could be a combination of equity and debt, could
11 be equity, could be only debt. I cannot tell you what
12 it is, but the 4,800 is the amount of funding that it
13 was required to set up this business. It's not a lot.

14 Q. Again, you don't know how much debt this
15 company had? You don't have any information on this
16 company to--

17 (Overlapping speakers.)

18 Q. I hadn't finished my question.

19 A. (Mr. Nuñez) No, all I know is that according
20 to the Article, you need less than \$5,000.

21 Q. From your review of the Financial Statements
22 that KML had a revolving line of credit since 2011; is

1 that correct?

2 A. (Mr. Chodorow) I would have to go back and
3 look at when the--I think the line of credit that we
4 saw before was during 2011. I don't remember if they
5 drew on it in that year or not.

6 Q. In any of your two Reports, do you state
7 that those Financial Statements are unreliable? I'm
8 asking "yes" or "no."

9 A. (Mr. Chodorow) I don't remember.

10 Q. But you prepared to come to this Hearing
11 today; is that correct?

12 A. (Mr. Chodorow) I did.

13 Q. Thank you.

14 So, again, in any of your two Reports, do
15 you state that those Financial Statements are
16 unreliable?

17 A. (Mr. Chodorow) I--I don't recall.

18 Q. Do you believe they are?

19 A. (Mr. Chodorow) I think they don't reflect
20 what [REDACTED] suggested they reflected with, for
21 example, the write-off. But I don't know if that's a
22 problem with the Financial Statements or it's

1 something that--a problem with the stated fact that
2 the inventories were written off.

3 Q. My question is: Have you stated that in
4 your Reports at all?

5 A. (Mr. Chodorow) I don't remember.

6 MR. SMYTH: With respect, I think the Expert
7 has answered the question. It's been asked several
8 times now.

9 MS. HORMAZABAL: We're just asking a
10 question about their Reports. They should know their
11 Reports they prepared to come here today.

12 MR. SMYTH: If you repeatedly ask the same
13 question and get the same answer, with respect, I'm
14 not sure where that gets us.

15 PRESIDENT McRAE: I think the last question
16 was slightly different. It was asked, have you stated
17 it in your Report.

18 THE WITNESS: (Mr. Chodorow) I don't recall.

19 MS. HORMAZABAL: Thank you.

20 BY MS. HORMAZABAL:

21 Q. Will you agree with me that a company that
22 purchases \$1.33 billion's worth of gold in a year

1 requires a lot of financing or capital?

2 A. (Mr. Chodorow) It's--there is not a lot of
3 detail on the amount of capital in the Balance Sheets.
4 We understand that they were doing some borrowing.
5 They were funding them either through short-term
6 payables or through short-term debt with [REDACTED].

7 Q. So, you do agree with me?

8 A. (Mr. Chodorow) That financing is needed?
9 Yes.

10 Q. That a lot of finance is needed in order
11 to--so, there is a larger barrier to Entry than what
12 you're saying?

13 A. (Mr. Chodorow) Well, so, certainly a company
14 needs financing, but [REDACTED] was able to obtain
15 financing--sorry, KML was able to obtain financing.

16 Q. Thank you.

17 Mr. Nuñez, you presented on the topic of
18 taxation of LLC income here today; is that correct?

19 A. (Mr. Nuñez) Yes.

20 Q. You went into detail about a potential
21 windfall to Shareholders of KML by not deducting the
22 taxes?

1 A. (Mr. Nuñez) That's correct, yes.

2 Are you referring to the slide I presented
3 today?

4 Q. Yes.

5 A. (Mr. Nuñez) Yes.

6 Q. You also noted that these Shareholders are
7 not Claimants. I just want to make that clear for the
8 record.

9 A. (Mr. Nuñez) I see that my colleague said
10 that--answered that question, yes. They're not
11 Claimants.

12 Q. Thank you.

13 Do you agree, then, Mr. Smajlovic is not
14 calculating damages to Shareholders but to KML LLC, in
15 the lost Enterprise Value--

16 A. (Mr. Nuñez) Mr. Smajlovic is calculating
17 damages on the basis of Fair Market Value. He says
18 that.

19 Q. Okay. So, going back to that same question
20 about the 4,800 in capital, you do note in your
21 footnote that it states that the firm traded
22 250 million allegedly using only 4,800 in capital. Do

1 you think that's virtually possible without that?

2 A. (Mr. Nuñez) Can you point me to the figure
3 of the 250 that you're referring to?

4 Q. It's in this footnote right there, 152.

5 A. (Mr. Nuñez) You said 250.

6 Q. On the bottom of the Footnote 152. Do you
7 see the calculations you did there?

8 A. (Mr. Nuñez) Yes, 5 tons of gold valued at 45
9 is worth 225, yes.

10 Q. That is virtually impossible; is that not
11 correct? Does the math make sense?

12 A. (Mr. Nuñez) Can you please show me exactly
13 what I'm trying to illustrate or show here?

14 Q. So, let's go back to the paragraph where you
15 discuss the 4,800 in capital.

16 A. (Mr. Nuñez) Yeah, okay.

17 Q. And then we can scroll down and show your
18 footnote. And does it make sense that with only 4,800
19 a company could purchase 5 tons of gold?

20 A. (Mr. Nuñez) 5 tons of gold. Well, that's
21 what--

22 Q. It sounds like very simple math.

1 A. (Mr. Nuñez) Yeah, the math is and that's
2 what I'm saying, 225 million.

3 Q. With 4,800 they were able to purchase
4 225 million's worth of gold?

5 A. (Mr. Nuñez) That's what it says, yeah.
6 Yeah, that's what this would suggest.

7 Q. Have you confirmed this? That doesn't sound
8 correct, does it not?

9 A. (Mr. Nuñez) No.

10 Q. Okay.

11 A. (Mr. Nuñez) We're basing it on the argument
12 in the Article.

13 Q. Thank you.

14 In Paragraph 199 of your Second Report, from
15 my understanding is you attempt to criticize
16 Mr. Smajlovic's comparison of the 5.19 Discount Rate
17 to the 3.8 percent of the WACC actually used by
18 Barrick Gold in a project.

19 Why wouldn't a real company--a company's
20 real WACC not be comparable?

21 A. (Mr. Nuñez) Our criticism or our observation
22 of Mr. Smajlovic was that he says 5.19 percent is

1 reasonable because Barrick Gold has a 3.8, and we
2 noted that that's not an apples-to-apples comparison
3 because the 5.19 is a nominal rate, the 3.8 is a real
4 rate, that is net of inflation.

5 Q. What is the Discount Rate you propose?

6 A. (Mr. Nuñez) We, in our corrections, we used
7 the second benchmark than Mr. Smajlovic proposed which
8 is based on the data from Damodaran, which he claims
9 to yield or to be 4.4 percent, we say that the data
10 that Professor Damodaran provides, actually applies
11 8.4 percent.

12 Q. Is your 8.4 percent based off of the mineral
13 industry or the gold mineral? Is that--

14 A. (Mr. Nuñez) In the industry, I think it's
15 precious metals. But what we do is Mr. Smajlovic
16 proposes that as a benchmark. He says I'm going to
17 take the information from Professor Damodaran for the
18 mining, for the precious metal industry. He takes
19 some inputs from there and makes calculations that you
20 cannot do. You either take all the inputs or you
21 don't. You cannot change some of those like
22 Mr. Smajlovic did.

1 So, we're saying, if this is to have some
2 meaning, you have to take Professor Damodaran's
3 calculation, and that implies 8.4.

4 Q. And you were able to look at all the risks
5 implied in that particular WACC for a minerals
6 industry? Do the same risks apply to KML's business?

7 A. (Mr. Nuñez) Again, Mr. Smajlovic proposes
8 that as a check on his--on his Discount Rate. If
9 you're going--if you're going to look at the risks
10 that are built in that calculation, you have to take
11 all of that. You cannot just say well, the risks are
12 lower here, but I'm going to take some of that, some
13 of those inputs and change others. That doesn't--it's
14 just not--it just violates financial principles.

15 Q. Okay. We will disagree. I will move on.

16 REALTIME STENOGRAPHER: This is the Court
17 Reporter. Can we take a two-minute break?

18 PRESIDENT McRAE: That's an imperative, and
19 we take the two-minute break.

20 (Brief recess.)

21 PRESIDENT McRAE: Perhaps after that break,
22 we could take stock of where we are in terms of

1 timing.

2 MS. HORMAZABAL: I believe I have around
3 three lines of questioning, maybe 20 minutes.

4 PRESIDENT McRAE: Thank you. Then proceed.

5 MS. HORMAZABAL: Thank you.

6 BY MS. HORMAZABAL:

7 Q. Could you please read Paragraph 27 of your
8 First Report, the last sentence of Bullet Point No. 3.
9 I can read it out loud for you.

10 "Competition would be expected to drive
11 rates of return down towards the Cost of Capital under
12 such circumstances." I have learned that Cost of
13 Capital is equal to the Discount Rate and the proposed
14 Discount Rate that you have just provided was
15 8.2 percent; is that correct?

16 A. (Mr. Nuñez) Yes, it's 8.4, but, yes,
17 that's--in our corrections that's the Cost of Capital
18 that we use.

19 Q. Thank you for correcting me. I don't know
20 why I always say 8.2. 8.4.

21 Do you know the--do you know your IRR or
22 your return rate of investment percentage for your DCF

1 calculations?

2 A. (Mr. Nuñez) When you mean our DCF, you mean
3 our corrections or Mr. Smajlovic's?

4 Q. Your proposed damages calculations. Do you
5 know what the IRR or the return rate of investment
6 percentage is?

7 A. (Mr. Nuñez) I don't think that we have
8 calculated the IRR on the 8.4.

9 Q. But you do comment here that it should be or
10 should equate to the Discount Rate the Cost of
11 Capital. If I'm not misinterpreting your Paragraph 27
12 that's highlighted there.

13 A. (Mr. Nuñez) What we're saying is that, you
14 know, this is a general point, but it applies here,
15 that if the market is competitive or under
16 competition, the rates of the return that you would
17 have observed would approach the Cost of Capital.
18 That is correct.

19 Q. Can we do a small exercise here with one of
20 the Excel sheets from Brattle?

21 PRESIDENT McRAE: Do you have any problem
22 with this?

1 MS. HORMAZABAL: Any objections?

2 MR. SMYTH: Absolutely not.

3 PRESIDENT McRAE: Go ahead.

4 MS. HORMAZABAL: Thank you.

5 BY MS. HORMAZABAL:

6 Q. As you see here, we have already switched
7 over the toggles all to Brattle, to reflect Brattle.

8 A. (Mr. Nuñez) Okay.

9 Q. And this took me a while, so bear with me.

10 A. (Mr. Nuñez) And just to be clear, this is
11 our updated--this is from our Second Report, the
12 exhibit that we submitted with our Second Report, that
13 should be 108. Yes, that's correct. I can see that.
14 Thank you.

15 Q. Thank you for confirming.

16 So, if we go to Tab T1, 2, 9, 10, to confirm
17 that by switching all of the toggles, total damages
18 decreased to the 13,731,284 Pre-Award Interest or
19 14,000,328 after including Pre-Award Interest, which
20 are Brattle's total damages; is that correct?

21 A. (Mr. Nuñez) I'm going to take your word for
22 it, but it looks--I'm not going to dispute that.

1 That's the number that we have in our Report.

2 Q. I just want to show you so you can see that
3 we've done everything accordingly.

4 A. (Mr. Nuñez) Yes.

5 Q. And then in Tab T6, Cell J25. Are we
6 already in T6? Cell J25, you can also confirm that
7 the numbers correspond, or you can even look at your
8 own report to confirm?

9 A. (Mr. Nuñez) That's fine.

10 Q. If we go to Tab C3, where you, Brattle, have
11 presented various IRR calculations?

12 A. (Mr. Nuñez) Yes.

13 Q. After switching all the toggles in the first
14 step, you can see that in Cell I10 that, in accordance
15 with your inputs, your total Return on Investment is
16 71 percent; is that correct?

17 A. (Mr. Nuñez) That's what it says there, yes.

18 Q. Do you want to correct your initial
19 statement that the IRR should be closer to the
20 8.4 percent that you had initially discussed?

21 MR. SMYTH: Before the Witness answers the
22 question, can we just be clear what you've adjusted in

1 the Excel? I think you mentioned you changed some of
2 the toggles. What exactly have you done? Just to
3 help us clarify.

4 MS. HORMAZABAL: I thought I was very clear.
5 Do you want me to go through it?

6 BY MS. HORMAZABAL:

7 Q. Did you understand what I did?

8 A. (Mr. Nuñez) I think I did. I'm going
9 to--the numbers look very similar to what we have in
10 our presentation, that are numbers that I remember, so
11 I'm okay answering the question.

12 Q. We're not trying to--

13 (Overlapping speakers.)

14 MR. SMYTH: If the Expert is happy to answer
15 the question, then go ahead.

16 MS. HORMAZABAL: Thank you.

17 BY MS. HORMAZABAL:

18 Q. So, do you see that 71 percent; is that
19 correct?

20 A. (Mr. Nuñez) Yes.

21 The only observation that I could say here
22 is that the labeling the 71 percent would be the

1 annual return implied, in this case would be Smajlovic
2 model adjusted for Brattle inputs, if you will.

3 Q. Okay.

4 A. (Mr. Nuñez) Just to be clear, this is not
5 Mr. Smajlovic's model anymore.

6 Q. Okay. Thank you.

7 A. (Mr. Nuñez) But let me answer it now.
8 71 percent again, this is--71 percent is still higher
9 than the 20 percent that Apple returns.

10 Q. That wasn't the question. The question was
11 you created your own, you made your adjustments, you
12 created your own DCF. What you have stated in your
13 Report doesn't correlate with what you have
14 calculated?

15 A. (Mr. Nuñez) No, that's not--that's not
16 correct.

17 What we said is that we started with the
18 Smajlovic model, and we make reasonable corrections to
19 the extent that we can, and this is the best we can
20 do.

21 Looking at this, what it's clear is that the
22 returns are still higher than the Rate of Return, 8.4

1 or 5.19.

2 Q. Mr. Nuñez, what is your Rate of Return based
3 off of your own corrections?

4 A. (Mr. Nuñez) What is your Rate of Return?
5 It's implied, if I take everything that you said, it
6 says that it's 71 percent.

7 Q. Thank you.

8 If we can go to Paragraph 33 of your First
9 Report, and you stated this quite a few times in
10 Paragraphs 210, in Paragraph 234, where you state--the
11 first one: "We were instructed by counsel that the
12 appropriate Pre-Award Interest Rate should reflect no
13 risk of default." Is that correct?

14 A. (Mr. Nuñez) Yeah, that's what it says.

15 Q. And you took the instruction; is that
16 correct?

17 A. (Mr. Nuñez) But then we're saying that even
18 in the rest should reflect potential for default by
19 the Respondent, we do both. We did--we offered that
20 we were instructed that the Pre-Award Interest should
21 reflect no risk of default, but then we provided the
22 two versions as we discussed this afternoon.

1 Q. Okay. This is just of the first one. I
2 will show you in another circumstance where you also
3 say you took the instruction.

4 A. (Mr. Nuñez) Yeah, that's our understanding
5 that it should reflect no risk of default.

6 Q. So, you did take the instruction; is that
7 correct? "Yes" or "no."

8 A. (Mr. Nuñez) If that's--yes, that's the
9 instruction.

10 Q. Thank you.

11 Would you say this instruction is
12 over-reaching?

13 A. (Mr. Nuñez) I don't know what you mean by
14 "over-reaching."

15 Q. Again, this is an instruction from counsel,
16 your counsel is instructing you regarding financial
17 matters; is that not correct?

18 A. (Mr. Nuñez) No, I'm not--these are not
19 financial matters. That's an instruction in terms of
20 whether I need to consider there should be a risk of
21 no default. However, we are very clear that we can
22 see there are the two alternatives. Whether there's

1 risk of default or not, is a legal matter.

2 Q. So, interest is not a financial matter? Is
3 that what you're telling me?

4 A. (Mr. Nuñez) No, that's not what I'm saying.
5 Is that the instruction here does not reflect
6 financial matters. Whether in the context of the
7 dispute here, as Mr. Chodorow discussed this morning,
8 if the Tribunal decides that there was a risk of no
9 payment of default or not, is a legal matter.

10 Now, depending on what you tell me I should
11 assume, then I can tell you what's the appropriate
12 rate to use.

13 Q. So, the taking of risk to you is not a
14 financial matter, it's a legal matter; is that what
15 you're telling me? I'm trying to understand what
16 you're saying.

17 A. (Mr. Nuñez) In the context of the
18 arbitration, whether--if the Tribunal finds that there
19 is an award, there is a payment to be awarded to KML
20 and whether--that becomes a loan, as we discussed,
21 from Perú to the Claimant, when the liability, when
22 the loan happened determines whether there is a risk

1 of non-payment or not. That is a legal matter.

2 So, depending on that, we calculate the rate
3 that is commercially reasonable under that legal
4 instruction.

5 Q. So, you base this--you base this on Legal
6 Counsel's instruction. Do you know of any businesses
7 that pay a Risk-Free Rate?

8 A. (Mr. Nuñez) Any businesses that pay
9 Risk-Free Rate? I don't know. The U.S. Treasury
10 obviously pays a Risk-Free Rate, the U.S. Treasury,
11 and there's some companies that are very low risk AAA
12 companies play very, very close.

13 Q. Is that a business?

14 A. (Mr. Nuñez) No, that's what I'm saying. The
15 Risk-Free Rate is a rate of--the Interest Rate that
16 the U.S. Treasury, basically the U.S. Government, and
17 there are companies, some, very few, that are--that
18 pay very close to the Risk-Free Rate.

19 Q. Is it a reasonable commercial rate what a
20 reasonable business would pay?

21 A. (Mr. Nuñez) But you have to distinguish here
22 that the commercial reasonable rate in this context is

1 not about a business. It's that effectively Perú
2 became a--or KML would become a lender to Perú, so you
3 need to think about what is the risk that involves
4 that relationship, whether businesses pay or not,
5 Risk-Free Rate, it's frankly irrelevant to this
6 particular question of whether what's the
7 "commercially reasonable" rate in the circumstance
8 that there is an award, when that liability arised,
9 and understanding that Perú becomes a creditor--sorry,
10 that KML becomes a creditor to KML.

11 Q. So, is it your position that the sovereign
12 debt of Perú is risk-free? I know you talked about
13 the United States.

14 A. (Mr. Nuñez) No, that's not my assumptions.
15 As a matter of fact, we showed this morning that the
16 risk--that the cost of borrowing of Perú slightly
17 higher than the Risk-Free Rate. You can put that in
18 front of me one as of our slides. As a matter of
19 fact, it's slide--Slide 38 of our presentation.

20 Yes.

21 Q. My question is: So, having Perú as a
22 borrower, as a debtor, is risk-free? That's what

1 you're telling me?

2 A. (Mr. Nuñez) That's not what I'm saying. The
3 second--

4 Q. If you can clarify that for me, please.

5 A. (Mr. Nuñez) The second bullet here says "if
6 damages were subject to risk of non-payment, then the
7 appropriate commercial rate would be Perú's U.S.
8 dollar borrowing rate which is shown in the blue bars
9 which is clearly higher than the Risk-Free Rate in
10 red," so certainly is not.

11 Q. So, what is appropriate in this case without
12 taking into consideration your legal instructions?

13 A. (Mr. Nuñez) It's not for us. It's a legal
14 matter whether Perú--

15 Q. This is a financial matter, is it not? We
16 just discussed this with you.

17 A. (Mr. Nuñez) The risk--in the market, Perú
18 pays the rate that is in blue in the market. That's
19 the commercial reasonable--I'm sorry, that's the
20 Market Rate that Perú pays to unsecure borrowers in
21 the market. That's the risk--includes--the rate
22 incorporates the risk of default of Perú. That's

1 unquestionable.

2 Q. So, having Perú as a debtor is not risk-free
3 as you're showing me here; is that correct?

4 A. (Mr. Nuñez) Yes, that's--unequivocally.

5 Q. Thank you.

6 How about Post-Award Interest? Do you
7 recall what your position was?

8 A. (Mr. Nuñez) I don't think that we commented
9 on Post-Award Interest.

10 Q. In your Opening Statement, you stated that a
11 certain Interest Rate would not give KML an incentive
12 to collect; is that correct?

13 A. (Mr. Nuñez) Sorry, can you--can you show me
14 on the screen?

15 Q. Did you say that in your Opening or not?

16 A. (Mr. Nuñez) On the Opening today?

17 Q. I will repeat the question.

18 In your Opening, you stated that a certain
19 Interest Rate would not give KML an incentive to
20 collect--is that correct?--collect the Award.

21 A. (Mr. Chodorow) That's correct. We did make
22 that statement, and that was the statement that, if

1 the Pre-Award Interest--

2 Q. Thank you.

3 A. (Mr. Chodorow) --Rate exceeds the Cost of
4 Capital, then there is an incentive to delay payment.

5 Q. Thank you.

6 Is it correct that Perú can voluntarily pay
7 an award at any time?

8 A. (Mr. Chodorow) That's a legal matter that I
9 can't opine on.

10 Q. I mean, you've told me that you have been in
11 this international arbitration realm for a while--both
12 of you, actually--can any debtor pay voluntarily at
13 any time?

14 MR. SMYTH: The Expert has already testified
15 that this is a legal matter on which he can't opine
16 on, so we don't see the sense in further questioning
17 on this point.

18 MS. HORMAZABAL: This is a financial matter.

19 MR. SMYTH: I believe he just testified it's
20 a legal matter.

21 MS. HORMAZABAL: I would beg to differ.

22 PRESIDENT McRAE: What's a legal matter, I

1 don't think it can depend on the assessment of the
2 Expert as to what is a legal matter, but it seems to
3 me you're asking a question about their entitlement to
4 pay, which sounded to me rather like a legal matter.

5 MS. HORMAZABAL: If any person has a right
6 to pay at any time. Be it a person, a country--

7 PRESIDENT McRAE: If you were to ask--

8 MS. HORMAZABAL: They mentioned that there
9 was an incentive for KML to collect--to not collect.
10 So I'm just asking a legal--I mean, the financial
11 expert, if it is correct that Perú can voluntarily pay
12 an award at any time.

13 It goes to whether what appropriate interest
14 would be applicable?

15 PRESIDENT McRAE: But, I mean, the question
16 of whether or not you're entitled to pay at any time
17 strikes me as being a legal question. The question of
18 whether you would have an incentive to pay or not,
19 that strikes me as a financial question.

20 BY MS. HORMAZABAL:

21 Q. What is more important? Is it the incentive
22 for Perú to pay or for KML not to collect?

1 A. (Mr. Chodorow) I--I don't know the answer to
2 that question. We don't get involved in enforcement
3 proceedings, and so I don't know what the rules are
4 with respect to enforcement. If you're saying which
5 is stronger, they can both have incentives in theory,
6 depending upon how the Pre-Award Interest Rate is set.
7 That's one of the reasons that we say it's appropriate
8 to make sure that the risk scenario that is legally
9 determined, whether it's that the damages are deemed
10 to have been incurred in the past and there was a
11 liability arising from the moment that happened, or if
12 the liability only attaches once an award is issued.
13 That's the distinction between the Risk-Free
14 Rate--right?--it's a scenario where the Tribunal says
15 Perú doesn't owe anything at all--

16 Q. We are asking about Post-Award. I don't
17 know if--

18 A. (Mr. Chodorow) So, we didn't opine on that.
19 I think that the appropriate Post-Award Rate would be
20 consistent with the Perú-U.S. dollar borrowing rate.

21 Q. Does a higher Interest Rate provide an
22 incentive for Perú to pay or not?

1 A. (Mr. Chodorow) It would provide an incentive
2 to pay as well as penalize Perú.

3 Q. Thank you.

4 MS. HORMAZABAL: We have nothing further.

5 PRESIDENT McREA: Thank you very much. Do
6 you have any redirect?

7 MR. SMYTH: We do have a couple of very
8 short questions. And I promise we'll be brief, I
9 don't want to test the Tribunal's or Mr. Kasdan's
10 patience.

11 REDIRECT EXAMINATION

12 BY MR. SMYTH:

13 Q. So, you were asked about the revenues and
14 volumes generated from outside of Perú; and, in that
15 regards, if I could just take you to Paragraph 119 of
16 your First Report. If that could be projected on the
17 screen, that would be helpful.

18 In the meantime, I can just read you the
19 sentence that I was drawing your attention to.

20 So, here it says: "However, the basis for
21 claiming losses outside of Perú as a result of the
22 Measures is even more speculative than the alleged

1 losses within Perú."

2 Would you care to expand on that?

3 PRESIDENT McRAE: You're rather difficult to
4 hear.

5 MR. SMYTH: I'm not close enough to the
6 microphone.

7 BY MR. SMYTH:

8 Q. We're looking at the second sentence of
9 Paragraph 119, and it says: "However, the basis for
10 claiming losses outside of Perú as a result of the
11 Measures is even more speculative than the alleged
12 losses within Perú."

13 Would you care to expand on that statement?

14 MS. HORMAZABAL: We did not ask that
15 question. The redirect needs to be limited to our
16 cross-examination.

17 MR. SMYTH: With respect, questions were
18 asked about the volumes that were sourced outside of
19 Perú and the Expert's opinions were challenged on
20 that, so we consider that this question falls within
21 the scope of the cross and, therefore, redirect.

22 PRESIDENT McRAE: When you're asking to

1 expand on something, presumably there will be
2 something that was said in the course of the
3 cross-examination. And I'm actually am not quite sure
4 when you say ask to expand on this, what the context
5 was because you're asking him to expand on something
6 in the written pleadings, as I understand.

7 MR. SMYTH: So, the questions were around
8 the instructions that the experts received with
9 respect to volumes outside of Perú, and I believe the
10 suggestion was that the conclusions in relation to
11 those volumes were purely based on an instruction.
12 However, I do not think that accurately reflects
13 Brattle's testimony, so I was asking them to expand on
14 that point.

15 PRESIDENT McRAE: Okay. Well, you put it
16 slightly differently now, and that's a slightly
17 different question, so go ahead.

18 THE WITNESS: (Mr. Chodorow) Yeah, yes, so
19 we deem that to be very speculative, and I think I
20 mentioned this before, but there is only one single
21 number or--that goes into this analysis, and that's
22 the split of--the assumed split of 53 percent outside

1 of Perú, 47 percent inside. There is no analysis as
2 to the growth potential, the competition, there is no
3 identification of which countries this would come
4 from, and it's very inconsistent with the fact that
5 between 2012 and 2013, I believe, there was fairly
6 limited growth that Mr. Smajlovic's model assumes
7 would all of a sudden become very rapid in 2014 and
8 beyond. And so we deem that to be very speculative.

9 BY MR. SMYTH:

10 Q. Thank you.

11 And you were also asked some questions about
12 a revolving facility between [REDACTED] and KML, and there
13 was also some discussion about long-term debts. Would
14 you consider a revolving facility to be long-term debt
15 or not?

16 A. (Mr. Chodorow) It could be. It would depend
17 on the terms. This one, I note that the debt
18 associated with--that was taken out from [REDACTED] appears
19 as a current liability on KML's Balance Sheet, and a
20 current liability is liability that is due within less
21 than one year under accounting definitions, and that's
22 something that Mr. Smajlovic highlighted as well in

1 his Report about the timing of one year separating
2 long term and current liabilities.

3 Q. Thank you.

4 MR. SMYTH: No further questions,
5 Mr. President.

6 PRESIDENT McRAE: Thank you.

7 Do you have any recross?

8 MS. HORMAZABAL: No. Thank you.

9 PRESIDENT McRAE: Thank you.

10 QUESTIONS FROM THE TRIBUNAL

11 ARBITRATOR FERNÁNDEZ: I have a very general
12 question because, at the outset, at the beginning of
13 your intervention and the intervention and the answers
14 that you provided during the cross-examination,
15 questions were asked about the methodology, and we are
16 experts in the legal field. I do not have any
17 background in accounting. This is personally
18 speaking, and I would like for you to explain to me
19 since a legal practitioners have a methodology that is
20 well-accepted, and we know how far to go and there are
21 no surprises, but here we heard about the cost-based
22 method--he's not understanding?--

1 THE INTERPRETER: Can you hear me? This is
2 interpretation into English. One, two, one-two
3 testing. Yes, can you hear me, sir?

4 THE WITNESS: (Mr. Chodorow) Yes, I can.

5 ARBITRATOR FERNÁNDEZ: So, let me repeat my
6 question.

7 At the beginning of your answers during the
8 cross-examination, something was said about the
9 methodology used in the reports that we heard today of
10 the accounting methodology, which, as we heard, it is
11 the cost-based method. We're also heard about the
12 cash-flow method, so the question is something that
13 has already come up in other arbitrations, and there
14 is a significant ICSID case, in particular Tecmed,
15 that discussed it because whether using one method or
16 the other, what is the outcome, and also given the
17 methodology used in mining, what would be the proper
18 method or whether it is whimsical to choose the method
19 because the method yields a result.

20 So, I would like for you to focus or to tell
21 me, someone that is a layperson here in the area of
22 accounting, what are the options--what are the

1 consequences of those options?

2 THE WITNESS: (Mr. Chodorow) Thank you.

3 So, briefly. So, there are the three
4 methodologies that are recognized in valuation.
5 There's the Market Method, which I think both Brattle
6 and Mr. Smajlovic agree is not--is not useful here
7 because there aren't good comparables, so that leaves
8 us with the Cost Method, and the DCF, and they both
9 have weaknesses in this case. One is that the Cost
10 Method that looks at historical or sunk investment
11 generally, as it's applied in arbitration, is it
12 doesn't necessarily reflect Fair Market Value because
13 the value of an asset can change after you've made the
14 investment.

15 And in mining cases--and I wouldn't
16 characterize this as necessarily a mining case because
17 it's more about the output, but in mining cases, when
18 you have early-on projects where it's difficult
19 to--it's difficult to figure out, say, for example,
20 you don't have reserves or resources, generally the
21 methods like CIMVal suggest the use of the Cost
22 Method. And that is an accepted method, but it has

1 the short-fall that it doesn't necessarily reflect
2 Fair Market Value.

3 Now, in this case, we didn't apply the Cost
4 Method. Again, in general, we have concerns about its
5 reflection of Fair Market Value, but we do have the
6 data to do it, and those are the inputs that go into
7 the Internal Rate of Return calculation, and I don't
8 have those in front of me, but I think we see from the
9 Balance Sheet that the debt and equity investments in
10 the Company--and this includes all debt and equity
11 investments and debt that would be reflected, and it's
12 accounting for debt that would be reflected in
13 Mr. Smajlovic's forecast, that ends up being about
14 \$3 million. So, we think the Cost Method would come
15 in lower than the DCF for that reason. But I would
16 have to go back and check the numbers, but I think
17 those are about right.

18 And the Discounted Cash Flow Method, again,
19 we tend to prefer it in most circumstances. But here
20 it has the speculative nature that we discussed
21 because we don't have business plans, this was a
22 market that there's been debate about whether a

1 disrupted strategy means a disrupted market. We think
2 it would because Suppliers are changing their actions
3 and it changes the reliability or profitability in the
4 market. There is no--there's no good means to
5 forecast the ending Market Share that KML would
6 receive, and so all these things lead us to believe
7 that even the DCF is speculative, but it's hard to
8 weigh one against the other because neither--one is
9 not a measure--sorry--of Fair Market Value, and the
10 other is attempting to measure Fair Market Value, the
11 other being the DCF, but it's something that is very
12 imprecise and unreliable in the facts and
13 circumstances here.

14 So, unfortunately, I think there's not a
15 good answer. I think the DCF is a more--generally
16 would provide higher damages, given the amount of
17 investment that we've seen in this business.

18 I hope that is helpful.

19 ARBITRATOR FERNÁNDEZ: Yes, but the question
20 is whether, at the end of the day, by applying one
21 method or the other, the variation in the outcome is
22 significant or not.

1 THE WITNESS: (Mr. Chodorow) I think it
2 would--it would probably range from, you know, roughly
3 3 million of historical investment brought forward to
4 the date versus the roughly 13 million, and so I think
5 that the--I think that they end up being within a
6 relatively narrow range. I can't do the calculation
7 off the top of my head, but probably about 5 million,
8 maybe a little more for the sunk cost approach, and 13
9 or 14 million for the DCF-based approach.

10 ARBITRATOR FERNÁNDEZ: Thank you very much.

11 PRESIDENT McRAE: Well, thank you very much
12 to both of you for coming and giving your testimony
13 today. So, thank you, you are now relieved from your
14 obligations, and we now have to start whatever we have
15 left for the day and planning for tomorrow.

16 (Witnesses step down.)

17 PRESIDENT McRAE: It's certainly clear that
18 we are starting at 1:00 tomorrow. So, I'll get that
19 out of the way.

20 MR. DÍAZ-CANDIA: Yes, sir.

21 PRESIDENT McRAE: That's clear for both
22 sides? Okay. So, that's set aside for tomorrow.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED] [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

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[REDACTED]

9

[REDACTED]

10

[REDACTED]

11

[REDACTED]

12

[REDACTED]

13

PRESIDENT McRAE: Yeah, yeah, yeah.

14

Okay. Is there anything else we should

15

consider? Mr. Díaz-Candia?

16

MR. DÍAZ-CANDIA: Yes. I would like to

17

point out that today at lunch I was fed a dish called

18

"Peruvian chicken," and I think that's a

19

micro-aggression from the Centre.

20

PRESIDENT McRAE: We were not served

21

Peruvian chicken at lunch. I don't know whether

22

that's unfair or whether it's a balance that we

1 weren't given it.

2 MR. DÍAZ-CANDIA: For the record, that's
3 obviously a joke. I risk reading the Transcript out
4 of context.

5 PRESIDENT McRAE: Okay. Well, thank you
6 very much. We will then suspend today and start again
7 at 1:00 tomorrow.

8 (Whereupon, at 5:58 p.m., the Hearing was
9 adjourned until 1:00 p.m. the following day.)

POST-HEARING REVISIONS
CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted to me by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN